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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

King's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

EASTER TERM, 1836, to TRINITY TERM, 1837.



BY

ALFRED S. DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.



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CORRIGENDA.

Page 13, line 1, marginal note, *after* "defendant," add "who had taken."

317, line 2, marginal note, *for* "4 Will. 4," read "1 Will. 4."

485, line 7, marginal note, *for* "defendant," read "deponent."

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

KING'S BENCH PRACTICE COURT.

Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

REGULA GENERALIS.

EXAMINATION OF ATTORNEYS.

Regulations approved by the Judges in Easter Term, 1836, for the Examination of Persons applying to be admitted as Attorneys of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the Rule of Court made in Hilary Term, 1836.

1836.

WHEREAS, by a rule of the Courts of King's Bench, Common Pleas, and Exchequer, made in Hilary Term, 1836, it was ordered, that the several masters and prothonotaries for the time being of the said Courts respectively, together with twelve attorneys or solicitors, should be appointed by a rule of Court in Easter Term in every year, to be examiners, for one year, of persons applying to be admitted attorneys of the said Courts, any five of whom (one whereof to be one of the said masters or prothonotaries) should be competent to conduct the examination; and that from and after the last day of the present Easter Term, subject to such appeal as thereafter men-

1836.

tioned, no person should be admitted to be sworn an attorney of any of the said Courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time should be specially extended by the order of a Judge: And it was further ordered, that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the Judges; and that, until further order, such examinations should be held in the hall or building of the incorporated Law Society of the United Kingdom, in Chancery Lane, on such days (being within the last ten days of every term) as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three Courts, and desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall:

And whereas, by a rule of all the said Courts, made in this present Easter Term, it was ordered, that the several masters and prothonotaries for the time being of the said Courts respectively, together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, and Edward Archer Wilde, gentlemen, attorneys, should be, and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted attorneys of all or either of the said Courts from and after the last day of that term; and that any five of the said examiners, one of them being one of the said masters or prothonotaries, should be competent to conduct the said examination, in

pursuance of and subject to the provisions of the said rule in Hilary Term last :

1836.

In pursuance of the said rules, the following regulations for conducting the said examinations have been submitted to and approved by the Judges of the said Courts.

1. That every person applying to be admitted an attorney of any of the said Courts pursuant to the said rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left with the secretary of the said incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

2. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct,

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or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

4. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed papers, touching his fitness and capacity to act as an attorney.

5. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters or prothonotaries) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners present, or the major part of them, shall certify the same under their hands in the following form, viz:—

“ In pursuance of the rules made in Hilary and Easter Terms, 1836, of the Courts of King's Bench, Common Pleas, and Exchequer, We, being the major part of the examiners actually present at and conducting the examination of A. B., of &c., do hereby certify, that we have examined the said A. B., as required by the said rules: and we do testify that the said A. B. is fit and capable to act as an attorney of the said courts.”

(Signed by all the Judges).

Questions as to due Service, to be answered by the Clerk.

1. What was your age on the day of the date of your articles?
2. Have you served the whole term of your articles at the office where

the attorney or attorneys to whom you were articulated or assigned carried on his or their business? and if not, state the reason.

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3. Have you, at any time during the term of your articles, been absent without the permission of the attorney or attorneys to whom you were articulated or assigned? and, if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articulated or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

Questions as to due Service, to be answered by the Attorney.

1. Has A. B. served the whole term of his articles at the office where you carry on your business? and, if not, state the reason.

2. Has the said A. B., at any time during the term of his articles, been absent without your permission? and, if so, state the length and occasions of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney and solicitor?

And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship, (or assignment, *as the case may be*), bearing date &c., for the term therein expressed; and that he is a fit and proper person to be admitted an attorney.

The following notice has been posted up in the Common Law Courts, and at the Judges' Chambers, and all the law offices:—

1836.

EXAMINATION OF ATTORNEYS UNDER THE RULES OF HILARY
AND EASTER TERMS, 1836.

THE articles of clerkship, and answers to questions touching the due service and good conduct of persons applying to be admitted attorneys, are to be left with the secretary of the incorporated Law Society, at the Hall in Chancery Lane, within the first seven days of term (viz. between the 23rd and 30th May inclusive).

The first examination will take place at the Hall of the incorporated Law Society, on Saturday, the 4th of June, and commence at ten o'clock in the forenoon. The applicants are required to attend in the Hall at half-past nine on the day of examination.

Application for further information may be made to the secretary.

17th May, 1836.

R. MAUGHAM.

HEDGES v. JORDAN.

Where a writ of ca. sa. has been sued out, and the parties subsequently compromise, the Court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected.

BYLES shewed cause against a rule nisi obtained by *Barstow* for discharging a rule directed to the sheriff of Wiltshire requiring him to return a writ of ca. sa., or for further time to make his return thereto. It appeared from the affidavits that a writ of ca. sa. had been sued out against the defendant at the instance of the plaintiff. Before it was executed, terms were offered and accepted between the plaintiff and defendant, without the intervention of the plaintiff's attorney. The plaintiff then wrote a letter to the sheriff in these terms—" *Hedges v. Jordan*. I, the above-named plaintiff, have arranged and settled the action with the defendant, and I hereby require and caution you not to execute any warrant or other proceeding whatsoever against the above-named defendant in this action. Sarah Hedges." The compro-

mise, in pursuance of which this letter was written, had been effected without paying the plaintiff's attorney his costs, and he in consequence wrote to the sheriff a letter, in which he stated that the action had not been settled, and that if the sheriff would proceed to execute the writ of ca. sa. he should be indemnified. The sheriff, however, did not execute the writ, and the attorney accordingly ruled him to return it. In this difficulty, the present rule was obtained. *Byles*, who appeared on the behalf of the attorney, contended that the sheriff was bound to return the writ. His not doing so operated in furtherance of a collusive settlement of the action between the plaintiff and defendant in fraud of the attorney's lien. As against his own client, the attorney would have a right to retain the proceeds of the action in discharge of his claim for costs. He cited *Gould v. Davis* (a), in which the Court of Exchequer directed that a plaintiff should deliver up to his attorney a security which he had taken in satisfaction of his debt and costs, in consequence of a collusive arrangement between him and the defendant, without the knowledge of his own attorney. This case was afterwards recognised in *Young v. Redhead* (b). On the authority of these cases, it was contended that the present rule must be discharged.

1836.

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Barstow, in support of the rule, admitted that if the question now before the Court was one between attorney and client, the cases cited on the other side would be applicable. But under the existing circumstances in this case, they were not an authority against the application. Here, neither attorney nor client claimed the interference of the Court, but the sheriff. He was not to blame in any view of the case, and all he required was to be relieved from the difficulty in which the conduct of the plaintiff's

(a) 1 Tyr. 382.

(b) Ante, Vol. 2, p. 119.

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attorney had placed him. Whatever claim the attorney might think himself entitled to make on his client, he might use his own discretion as to the mode of enforcing it. He had no right to place the sheriff in his present circumstances. He cited *Alchin v. Wells* (a), where the Court of King's Bench held, that, if a compromise takes place after a levy under a fi. fa., and before sale, and either party rules the sheriff to return the writ, the Court will discharge that rule with costs to be paid by the party obtaining it. Again, in *The King v. The late Sheriff of London, in a cause of Rustin against Hatfield* (b), the Court set aside a distringas issued against the sheriff where the officer had given time to the defendant, and the plaintiff had acquiesced in the arrangement, and received part of the money without the privity of the sheriff. These two cases clearly shew that the sheriff was entitled to the relief which he sought to obtain by the present rule.

WILLIAMS, J.—From the affidavits in this case, it appears that an under-hand settlement has been made between the plaintiff and the defendant, without reference to the attorney of the former; and there is no doubt if the question under discussion merely affected the rights of the attorney and his client, the Court would not allow or countenance any such collusion. But here, the application is to relieve the sheriff from a difficulty into which the conduct of the parties has thrown him. On the one hand, the plaintiff has given him a formal notice not to proceed to execute the writ; and, on the other, the plaintiff's attorney has ruled him to return it. As to his returning it, he can only do so at his own peril. He is no party to the disputes between the attorney and his client. On the reason of the case, and on the authority of *Alchin v. Wells*, I think this rule ought to be made absolute for discharging the rule to return the writ.

Rule absolute.

(a) 5 T. R. 470.

(b) 1 Chit. Rep. 613.

1836.

MARGETSON v. TUGGHE.

CHILTON shewed cause against a rule nisi obtained by *J. J. Williams* for discharging the defendant out of custody, on entering a common appearance, for irregularity, with costs. It appeared by the affidavits, on which the rule had been obtained, that the defendant's surname only, without any description of person or residence, had been introduced into the affidavit of debt and the writ of capias, on which the arrest had been effected. In these omissions consisted the irregularity, on which the present motion was founded. In answer to the rule, it was sworn that the cause of action had arisen in France, and that the defendant was a foreigner; that he was in this country only for a short time, for a temporary purpose, and that the plaintiff was unacquainted either with his name or place of abode. The affidavit proceeded to state that various inquiries had been made, and great diligence used, in order to find out the defendant's residence, but in vain. He cited *Hicks v. Marreco* (a). He also cited *Hill v. Harvey* (b), where it was held that in a writ of capias it is sufficient to describe a defendant as of his late residence, although he may be actually residing at the time in some other place; and *Bosler v. Levy* (c), where the Court of Common Pleas doubted whether the name of the county need be introduced into the writ of capias.

A capias containing no other description of the defendant than his surname, is irregular.

J. J. Williams, in support of the rule, admitted that several cases had been decided in which it appeared that a particular description of the defendant's residence was not necessary, but none had gone so far as to determine that the Christian name of the defendant might be omitted. The most serious questions might arise in case of the defendant resisting the execution of the writ by the

(a) 1 C. & M. 84.

(b) Ante, Vol. 4, p 163.

(c) 1 N. C. 362.

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sheriff's officer. The mere surname for this purpose could be considered as no name, and therefore the defendant would be justified in resisting. If the consequence of his resistance were the death of the officer, the offence would only amount to manslaughter. He cited *Finch v. Cocken and Others* (a), in which the circumstances were these: a defendant, whose name was Cocken, was arrested upon a capias against him by the name of Cocker. He gave a bail-bond to the sheriff in the name of Cocken, sued as Cocker; and the bail-bond being afterwards assigned to the plaintiff, he declared on it against the defendant as Cocken, sued by the name of Cocker. The defendant pleaded, that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited, but the Court set aside the nonsuit and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of Cocker. But the Court, on motion in arrest of judgment, held that the declaration was bad, because a writ against Cocker need not authorize an arrest of Cocken, unless he was known by one name as well as the other, and there was no averment of that fact in the declaration; and that neither the 3 & 4 Will. 4, c. 42, s. 11, nor the 1st rule of Hilary Term, 2 Will. 4, s. 32, had made any alteration in the law in this respect. From this case it must be clear that a writ of capias against the defendant by his surname merely, would not authorize his arrest. If it would not authorize his arrest, it must surely be considered as irregular.

Cur. adv. vult.

WILLIAMS, J.—I have looked into the cases which have been decided on the Uniformity of Process Act with

(a) Ante, Vol. 3, p. 678.

respect to the writ of *capias*, but I do not find any reported case in which the point now for my decision has been determined. I find, however, that it was decided about two days since in the Court of Exchequer, in the case of *Ward v. Watts* (a). There, the plaintiff had not introduced any uncertain description of the defendant, but none at all. The Court there was of opinion that the writ was defective, and I feel myself bound by their determination. The present rule, therefore, I think, must be made absolute for the discharge of the defendant out of custody without costs, and no action must be brought.

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Rule absolute accordingly.

(a) Post.

SMITH v. HEAP.

G. T. WHITE shewed cause against a rule nisi obtained by *Humfrey* for cancelling the bail-bond on entering a common appearance, on the ground of a defect in the affidavit of debt. The action was brought for the recovery of a certain sum alleged to be due for the agistment of cattle, but the affidavit omitted to state that the plaintiff had agisted them "at the request" of the defendant. It was now contended, that, pursuant to the rule 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 8(a), it was not necessary that the words in question should be introduced. The words of that rule were:—"Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done *at the request* of the defendant." Here, the affidavit of debt was neither for money paid nor work and labour done, and therefore was not within the rule in question.

In an affidavit of debt for the agistment of cattle, it must be alleged that they were agisted "at the request" of the defendant.

(a) Ante, Vol. 1, p. 184.

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SMITH

v.

HEAP.

Humfrey, in support of the rule, contended, that although the rule of Court only made mention of affidavits for work and labour and money paid, they must be considered as instances, and not as the sole cases in which the words "at the request" were to be introduced. It was necessary, that they should be introduced in all similar cases. In Tidd's Forms, where the form of the affidavit of debt was given, those words were introduced. In *Witham v. Gomperts* (a), Mr. Baron Parke expressed his approbation of the practice of observing the forms given by Mr. Tidd, which had been for so many years in use. Under these circumstances, he contended that the present rule ought to be made absolute.

WILLIAMS, J.—I think I am giving effect to the intention of the rule of Court 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 8, by considering this affidavit of debt as insufficient. It is true that "agistment" is not mentioned in the rule, but I cannot distinguish in point of principle the case of agistment of cattle, and that of work and labour. Work and labour may have been done by the plaintiff, though not at the request of the defendant, and so cattle may have been agisted by the plaintiff, though not at the request of the defendant; and in neither case, would the defendant become liable to the plaintiff. In my opinion, the foundation of the debt is the *request* of the defendant. It is also to be observed, that, in the form given by Mr. Tidd, of an affidavit for the agistment of cattle, the words "at the request" are introduced. The present rule must be made absolute.

Rule absolute.

(a) Ante, Vol. 4, p. 382.

SMITH v. ALEXANDER.

HUMFREY shewed cause against a rule nisi obtained by *Chadwick Jones* for setting aside a warrant of attorney and the judgment signed thereon, as the debt, which formed part of the consideration of it, had been contained in the defendant's schedule when he took the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, and for referring it to the Master to ascertain what was due on the new consideration, the costs of the reference and the application to be paid by the plaintiff. It appeared from the affidavits that the defendant had been discharged from the debt of 27*l.*, for which he had been arrested, under the Insolvent Act. After his discharge, he applied to the plaintiff for a fresh advance of money and goods; and, as an inducement to obtaining the object of his application, offered to give a warrant of attorney for the amount of the goods, the money, and the old debt. The plaintiff, under these circumstances, complied with the defendant's request, and took the warrant of attorney now in dispute for the aggregate of all the amounts. On this warrant the plaintiff afterwards signed judgment. The question was, whether the warrant of attorney could be considered as invalid in consequence of a portion of its consideration having been discharged by the Insolvent Act.

A defendant the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, induced one of his creditors to give him fresh credit by executing a warrant of attorney for the old and the new debt; the Court set aside a judgment signed on that warrant to the extent of the old debt.

Humfrey contended that the warrant of attorney was valid, as not contrary to the policy of the Insolvent Act; and if it were not, the defendant was not entitled to relief on a summary application, but must adopt the remedy which, under such circumstances, was given by the act itself—namely, by plea.

Chadwick Jones, in support of the rule, referred to the language of sect. 61 of the Insolvent Act, by which it was

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enacted that the defendant should not become liable "on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon *any new contract or security* for payment thereof, except upon the judgment entered up against such prisoner, according to this act." In this case the judgment had not been entered up according to the provisions of the act, but had been entered up in an action commenced on a "new security." In *Evans v. Williams* (a), the principle was acknowledged that the additional advantage which the insolvent might gain as an inducement to his giving the fresh security, was not sufficient to render the instrument given for the discharged debt valid. In that case the defendant and his surety had signed a promissory note. Defendant was afterwards discharged under the Insolvent Act. The payee applied to the surety for payment, whereupon the defendant, to prevent his surety from being sued, joined him in a new note. The Court of Exchequer held, in an action by the payee, that he could not recover on this note against the defendant, as it was a new contract on the old debt, though the new consideration of forbearance to the surety was added. Lord *Lyndhurst* there observed, "The defendant executes a fresh note, including the same sum of money. That note was for the same debt or sum of money for which the defendant was liable before. The 7 Geo. 4, c. 57, s. 61, enacts that no action shall be brought for any such debt or sum of money, or upon any new contract or security for payment thereof. Now, is not this a new contract for the same debt or sum of money? The only new ingredient is an additional consideration thrown in." On the authority of this case, which was clearly in conformity with the language and intention of the Insolvent Act, he contended that the present rule ought to be made absolute.

(a) 1 Cr. & M. 30.

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WILLIAMS, J.—It seems to me that the language of the act is very strong, and the case cited shews that the Courts will act according to the intent of that language, which is large and general in the extreme. Section 61 provides that “no writ of fieri facias or elegit shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor *in any action upon any new contract or security* for payment thereof, except upon the judgment entered up against such prisoner according to this act.” The form mentioned in that exception has not been followed here. In this case, a warrant of attorney has been given. I grant it was at the particular request of the defendant, and for the purpose of getting a fresh loan of money and new credit, but it was with a reserve of the amount of the old debt.

Now, is it possible for me to say this is not a new security for the payment of a portion of that for which the defendant has been discharged? Mr. *Humfrey* has observed on the latter part of the section, that, if an action is brought, the defendant must plead his discharge under the act. That certainly is the case; and if an action had been brought, that is the mode he would have been obliged to adopt, as was done in the case of *Evans v. Williams*. But here, a plea is out of the question, as the defendant has had no opportunity of pleading it; and therefore, if the judgment on this warrant of attorney is not to be set aside on an application like the present, this new security is wholly without the means of impeachment. The language of *Bayley, J.*, is strong in the case referred to—“It has been urged that the defendant, after his discharge, was in the same situation as any third person. I think that he stands in a different situation, and that the act of Parliament prevents him from incurring this liability in the manner in which another person might have done.”

He was clearly of opinion that that argument would not

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apply to such a party. I am also of opinion that the language of the act is too strong, and that in whatever shape a party tries to get a new security, it would be bad to the extent for which the prisoner had been discharged under the Insolvent Act. This warrant of attorney, therefore, must be set aside to the extent for which the defendant was discharged, and can only stand for the new consideration. It must be referred to the Master to ascertain what is due on the new consideration. I shall say nothing about costs, as it was the defendant himself who solicited the plaintiff to take this warrant of attorney, in order to induce him to give the new credit.

Rule absolute accordingly.

ALDER v. PARK and IVESON.

A defendant executor does not preclude himself, by referring a cause, from availing himself of a plea of judgment recovered puis darrein continuance, while the reference was pending, although it appears from affidavits that he has a certain amount of assets in his hands.

TOMLINSON shewed cause against a rule obtained by *Wightman* for revoking the order of reference in this case, unless the plaintiff would consent that the defendants should be at liberty to plead a plea of judgment recovered puis darrein continuance, before the arbitrator. It appeared, from the affidavits, that this was an action of covenant, which had been brought against the defendants, as executors, on certain alleged breaches of covenants, into which the testator had entered in a conveyance executed by him; first, that the estate was free from incumbrance; and, second, that it was tithe-free. The defendants originally pleaded that the estate was tithe-free, but that plea was subsequently withdrawn, and the cause referred to an arbitrator. The only plea on the record was *plenè administravit*. The cause was referred by an order dated the 10th July, 1834. On this, the arbitrator proceeded, when several questions were raised before him, as to a tithe-suit which had been instituted against the plaintiff,

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and as to what were assets in the defendant's hands, as well as other matters. It also appeared that a dock share, and a sum of 1,200*l.* were in the hands of the executors, which had been specially bequeathed by the testator. While the reference was pending, an action of debt on a bond of the testator was brought against the defendants, and they confessed the action. There was no reason to believe that the debt was not bonâ fide, for which the bond had been given, or that the action was not adverse, without any collusion on the part of the defendants. The arbitrator had, as yet, made no award, but had enlarged the time for making it, in order that the defendants might come to the court to make the present application. The plea which it was sought by the defendants now to use was, that of judgment recovered in the action of debt on the bond. This it was contended they had no right to do. It was now admitted, that the defendants had in their hands a sum of 1,200*l.*, and a dock share. The proper course for them to have adopted in the present action was to have confessed assets to that amount, and then have pleaded the fact of such confession in the action on the bond. In *Waters v. Ogden* (a) the Court held such a plea to be good; under these circumstances the Court would not interfere to enable the defendants thus to avail themselves of a plea to deprive the plaintiff of the fruits of his action. If the defendants had any remedy at all, it was in a Court of equity. *Brady v. Sheil* (b).

Wightman, in support of the rule, contended that the only object of the defendants was, that they might not be placed in a worse situation by consenting to refer the cause, than they would have been in if it were still pending before the Court. Supposing the cause not to have been referred at all, but to be still in a state of pendency,

(a) 1 Douglas, 435.

(b) 1 Camp. 148.

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it was quite clear that the executors might have pleaded the judgment which had been recovered in the action on the bond. What objection, therefore, could exist to the defendant's being allowed to take advantage of the same plea, although the matter in dispute had been made the subject of a reference? In the second action on the bond, they had no valid defence, and therefore they were perfectly justified in not attempting to make any. The case of *Prince v. Nicholson* (a) shewed, that, where executors had allowed judgment by default to be signed against them, in an action subsequently brought against them, the Court will allow them to plead that judgment puis darrein continuance. In order to adopt the course suggested in *Waters v. Ogden*, they must have obtained leave to amend, and have pleaded the pendency of the other action. But, in an action for unliquidated damages, that plea would not have protected these assets. On the other hand, if these assets had been confessed, the plaintiff must have proceeded, in order to determine the amount to which the plaintiff should be able to shew himself entitled. It might ultimately prove that the plaintiff was not entitled to any thing.

WILLIAMS, J.—It appears to me that the only object of this application is to place the defendants in the same situation as if the cause were still pending before a Court of Nisi Prius. I think the fact of its being referred makes no difference; and, therefore, it appears to me only reasonable that the present rule should be made absolute. I do not by this determination at all pre-judge the case, as the question as to the effect to be attributed to such a plea will still remain open for the consideration of the arbitrator. The present rule must be made absolute.

Rule absolute.

(a) 5 Taunt. 665; 1 Marsh. 280. S. C.

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REX v. The Lord of the Manor of AGARSDLEY.

R. V. RICHARDS had obtained a rule nisi for a mandamus to the lord to admit one Janet Phillips on the Court roll, as tenant of certain lands, called Raven's Nest, within the said manor, upon an affidavit, which set forth the title of the applicant; tracing his pedigree from one James Phillips, who died in possession of the said lands in 1795, and stating further, that, on the death of James Phillips, one John Osborne had been wrongfully admitted by the lord, and had become party to a contract for the sale of the lands to one Colton, who had entered under the agreement, but which was never completed, and had remained in possession ever since. The affidavit further stated, that, about two years ago, proclamations had been made at the manor court for the customary heir of the said James Phillips.

Where it is clear, that, by the provisions of the 3 & 4 Will. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the Court will not compel the lord by mandamus to admit him.

J. C. Talbot now shewed cause, upon the affidavit of the steward of the manor, from which it appeared that, in 1809, John Osborne, referred to in the affidavit of the applicant, had brought an ejectment, the object of which was to try the question of heirship to James Phillips, and in that action he obtained a verdict which had never been impeached; that, in 1811, the death of James Phillips was duly presented by the homage, and proclamation made for his customary heirs, and John Osborne was thereupon admitted; that, upon his death, his devisee was admitted in 1820; and that, on her death in 1829, intestate, and no heir appearing, the lord had claimed and received rent of Colton, who had paid rent to her. It was, moreover, denied that any proclamations had been made since 1811 for the heir of James Phillips.

Upon these facts it was contended, that the applicant was not entitled to compel admittance; first, because it

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was unnecessary, since he might bring ejectment to try his title, before admittance—*Rex v. Bennett* (a); which case it was insisted was not overruled by *Rex v. Brewer's Company* (b), according to the report of that case in 4 Dowling & Ryland, 492. One ground at least of the decision as reported, namely, that the heir could not devise before admittance, is removed by the recent case of *Right v. Banks* (c), where it was held that he might do so. Secondly, that, at all events, the Court would not interfere in favour of an applicant whose claim had been shewn to be bad by his acquiescence in the adverse verdict of a jury. *Rex v. Bonsall* (d), *Widdowson v. Harrington* (e). Thirdly, that it would be useless to accede to the application in favour of a party whose claim must be barred by the operation of 3 & 4 Will. 4, c. 27, which applied expressly to copyhold as well as freehold lands (f), and removed whatever doubts might have existed heretofore as to the application of the former statutes of limitation to lands held by this tenure.

R. V. Richards, *contra*, insisted that *Rex v. Bennett* was overruled by the later cases, and, as to the last point, contended that the effect of the lapse of time, however

(a) 2 T. R. 197.

(b) 3 B. & C. 172.

(c) 2 B. & Ad. 664.

(d) 4 D. & R. 825.

(e) 1 Jac. & Walk. 542, and note to 1 Watk. Copyholds, 4th edit. 297.

(f) By section 1 of this statute it is enacted, "That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the con-

text of the act shall exclude such construction, be interpreted as follows—(that is to say), the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever; and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole); and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure."

material it might prove hereafter, ought not to be considered in this stage of the proceedings; and that a party claiming as heir was entitled as of course to be admitted.

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COLERIDGE, J.—I do not see any necessity for making this rule absolute, in order to enable the applicant to try his title. It seems to me that he is wholly out of time in making this application. By the provisions of the 3 & 4 Will. 4, c. 27, it appears that his claim to this property is barred by time. I shall not, therefore, grant the writ of mandamus now prayed. I do not, however, prejudice his right to try his title by refusing the writ. The rule must therefore be discharged.

Rule discharged.

GRANGER v. FRY.

WIGHTMAN moved for an attachment against the sheriff for not returning the writ. It had become returnable in vacation, and a Judge's order obtained for its return. A copy of the order had been served, but the original not shewn. The question therefore was, whether an attachment could issue under the circumstances. In the ordinary case of applying for an attachment, the original order must be shewn, but perhaps the case of a sheriff was different. He, being an officer of the Court whose process he was required to execute, was bound to obey it without being required to do so by an order.

In order to obtain an attachment against the sheriff for not returning a writ pursuant to a Judge's order, the original order must be shewn at the time of serving a copy of it.

WILLIAMS, J., (after consulting Mr. Hill, the clerk of the rules).—I think the original should have been shewn, in order to entitle the party to an attachment against the sheriff for not obeying the order.

Rule refused.

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WARD v. TURNER.

Where a plaintiff has given a peremptory undertaking to try at a particular assize, and he is prevented from fulfilling it by the sudden illness of the Judge, that is not a sufficient excuse to prevent the defendant from obtaining judgment as in case of a nonsuit absolute.

WHITEHURST shewed cause against a rule nisi obtained by *G. T. White*, for setting aside a rule absolute for judgment as in case of a nonsuit, which had been obtained by the defendant. It appeared from the affidavits, that the plaintiff had not proceeded to trial at the Spring Assizes of 1835, pursuant to his notice. In the following Trinity Term, a rule for judgment as in case of a nonsuit was obtained by the defendant. Cause was shewn against it, and the rule was ultimately discharged on a peremptory undertaking given by the plaintiff to proceed to trial at the then next Summer Assizes. Pursuant to his undertaking the cause was taken down to the assizes; but, Mr. Justice *Vaughan* becoming suddenly ill, it could not be tried, and was accordingly made a remanet. In the following term, no application was made by the plaintiff to enlarge his peremptory undertaking, but, after giving notice of trial for the last Spring Assizes, the record was withdrawn. In the present term a rule absolute for judgment as in case of a nonsuit was drawn up on reading the rule of the previous Trinity Term. The object of the present rule was to set aside the judgment signed pursuant to that rule. It was contended that the defendant was entitled to retain his judgment as in case of a nonsuit. Having given a peremptory undertaking he had bound himself, under any circumstances which might occur, to try his cause pursuant to it. The occurrence of an event which was not under his control did not furnish an excuse for not fulfilling the undertaking. The proper course for him to have pursued was to have applied to the Court for an enlargement of the peremptory undertaking. The Court might then have determined whether, under the circumstances laid before it, the application ought to be granted. The rule, as laid down in

Gilbert v. Kirkland (a), that, where a plaintiff has once taken his cause down to the assizes, and it has been made a remanet, the defendant cannot obtain judgment as in case of a nonsuit, did not apply to the present case, for there, no peremptory undertaking had been given. In addition to this, the defendant must be considered as entitled to his judgment on the ground of the second default committed by him in withdrawing his record, at the last Spring Assizes. From the case of *Dyke v. Edwards* (b), it might be inferred that the second default under such circumstances entitled the defendant to judgment as in case of a nonsuit.

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G. T. White, in support of the rule, contended that the decision in the case of *Gilbert v. Kirkland* was clearly in support of the present application. The non-existence of a peremptory undertaking in that case made no substantial difference in the question. A sufficient excuse for not fulfilling it was supplied by the sudden and unexpected illness of the Judge who was to have tried the cause. All that the plaintiff had undertaken to do was "to bring on the cause *to be tried* at the next assizes." That which the plaintiff had undertaken to do had been done by him. As to the supposed second default, the defendant could not now avail himself of that, as the judgment absolute had been obtained on reading the rule made in the previous Trinity Term. Under those circumstances, he could not avail himself of what had subsequently taken place.

COLERIDGE, J.—I think that when the facts of this case are looked into, it will be seen, that the case of *Gilbert v. Kirkland* has nothing to do with it. In order to ascertain whether it has, let us consider the circumstances under

(a) Ante, Vol. 2, p. 153.

(b) Ante, Vol. 2, p. 53.

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which a rule for judgment as in case of a nonsuit may be obtained. That is a rule given by the statute 14 Geo. 2, c. 17, when the plaintiff neglects to carry his cause down for trial according to the practice of the Courts. Now, in an early case, *King v. Pippett* (a), it was held, that, when once the plaintiff had taken the cause down for trial, the defendant was not entitled to judgment as in case of a nonsuit for a second default, but must resort to his remedy by carrying the cause down by proviso. The case of *Gilbert v. Kirkland* decides no more than this, that, where the plaintiff has once taken down his cause for trial, it does not signify whether he afterwards is passive, and takes no step in the cause, or whether he gives notice of trial, and abandons it; and that the defendant in neither case is entitled to move for judgment as in case of a nonsuit on the ground that the plaintiff has once taken down the cause for trial according to the course and practice of the Court, and that therefore the statutable mode of proceeding is taken away.

Here, the plaintiff had failed to take the cause down for trial, and been in default, and the defendant consequently had a right to his remedy under the statute, and had a rule nisi accordingly. That rule was discharged, not because it was improperly obtained, but on condition of the plaintiff undertaking to try the action at the next Assizes; so that the facts of this case, and that of *Gilbert v. Kirkland* are different. Then comes the question, whether there was any default on the part of the plaintiff at the next Assizes. In one sense there was none, as there was no moral fault, and no neglect on his part; but, in the sense of a condition, it was a peremptory undertaking to be responsible, though he had no control over the circumstances which prevented the trial. The plaintiff should have applied in Michaelmas Term to enlarge his peremptory

(a) 1 T. R. 492.

undertaking, and if that had been done, no doubt the Court would have looked into all the facts of the case. The only use of the subsequent default is to see how far the plaintiff may be excused, and whether he is entitled to an extension of time. I think, therefore, the case of *Gilbert v. Kirkland* does not apply, and that it was not an irregularity for the defendant to sign judgment as in case of a nonsuit two terms after; and, as at present the case appears before the Court, I do not see on the facts that the plaintiff is entitled to further time to try the cause.

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Rule discharged.

COURT OF COMMON PLEAS.

Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

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DOE *d.* SWINTON *v.* SINCLAIR and Others.

On a reference to arbitration of an action of ejectment and all matters in difference between the parties, the arbitrator directed that a sum of 50*l.* should be paid by the lessor of the plaintiff to the defendants by way of compensation for certain buildings erected by them, and that a verdict should be entered for the former. On motion, the Court directed the sum awarded to the defendants to be set off against the costs of the lessor of the plaintiff, saving the lien of their attorney.

THIS was an action of ejectment, which, with all matters in difference between the parties, had been referred to an arbitrator, and who had awarded in favour of the lessor of the plaintiff, but had directed two sums of 30*l.* and 20*l.* to be paid by him to the defendants by way of compensation for certain erections on the demised premises.

G. T. White, in Hilary Term, obtained a rule nisi to set off the above sums against the costs of the lessor of the plaintiff in the action of ejectment.

Humfrey and *Heaton* shewed cause.—They produced an affidavit made by the defendant's attorney, wherein it was sworn that a greater sum than 50*l.* was due to him from his clients; and submitted, that, inasmuch as the payment of the money was made a condition by the award, it should have been paid before any question as to costs could arise, and therefore, even as between the parties, it could not properly form the subject of a set-off; and that, at all events, the attorney's lien exceeding the sum awarded to the defendants, he would have been entitled to retain it as against all the world. They referred to *Newton v. Newton* (a) and *Watson v. Maskell* (b), and to 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 93 (c).

(a) 1 M. & Scott, 366; 8 Bing. 366, 727; ante, Vol. 2, p. 10.
202; ante, Vol. 1, p. 264.

(a) Ante, Vol. 1, p. 196.

(b) 1 Scott, 286; 1 New Cases,

G. T. White, in support of his rule.—As between the parties themselves, the set-off is clearly allowable—*Doe d. Hope v. Carter* (a): the only question is, as to how far it is affected by the attorney's lien. In *Howell v. Harding* (b), it was held, that the plaintiff is entitled to set off interlocutory costs in the same cause payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause, notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs &c. of the cause. *George v. Elston* (c) follows up and embodies the principle there laid down: there, a verdict was found against one of three defendants and in favour of the other two, and this Court deducted the costs of the two out of the plaintiff's costs and damages against the one, without regard to the plaintiff's attorney's lien. And in *Figes v. Adams* (d), it was held, that, if upon the reference of an action in this Court, the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off, without motion.

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PER CURIAM.—We think the rule in this case must be made absolute, saving the lien of the defendant's attorney for costs in the suit. The first question is whether these damages are properly the subject of a set-off. *Newton v. Newton* is an authority to shew that they are. There, by an order of Nisi Prius, it was agreed that a verdict should be entered for the plaintiff for nominal damages and the costs of the action, and that the plaintiff should pay the defendant a sum of 70*l.* due to her from him: and the Court permitted the 70*l.* to be set off against the costs in

(a) 1 M. & Scott, 516; 8 Bing. 330.

(b) 8 East, 362.

(c) Ante, Vol. 3, p. 419; 1 New Cases, 513.

(d) 4 Taunt. 632.

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the cause. If the 50*l.* awarded in this case can properly be considered as in the nature of damages, there is an end of the question. The case seems to us to fall within the spirit of the rule referred to.

Rule absolute accordingly.

MEGGS v. BINNS.

A bailable writ having been sued out of this Court against an attorney of the King's Bench, he, after some attempts to compromise, obtained a Judge's order to stay the proceedings on payment of the debt and such costs as the prothonotary should under the circumstances think reasonable. The prothonotary having allowed the costs of bailable process:—*Held*, that the parties were concluded by his determination.

BOMPAS, Serjt., on a former day, obtained a rule calling on the plaintiff's late attorney to shew cause why he should not pay to the plaintiff or to his present attorney the sum of 9*l.* 6*s.* 6*d.*, with the costs of the motion. From the affidavits in support of the application it appeared that the defendant was an attorney of the Court of King's Bench; that Mr. Healey, the plaintiff's late attorney, on the 5th of September, 1835, issued *bailable* process against the defendant; that, after a sum of 30*l.* had been paid to Mr. Healey on account of the debt and costs in the action, a summons was taken out to stay proceedings on payment of the balance of the debt, together with the costs of a *serviceable writ* only; that, on the 20th October, an order was thereupon made by Gaselee, J., for staying the proceedings upon payment of the debt, 75*l.* 16*s.* 7½*d.*, together with such costs as the prothonotary should think right under the circumstances; that the costs were ac-

The writ issued on the 5th September, and was sent to the under-sheriff of Hants on the 16th October. The order for a stay of proceedings was made on the 20th, on which day the plaintiff's attorney wrote to the under-sheriff at Winchester, desiring to be informed what was the amount of his and the officer's charges, and informing the under-sheriff that a Judge's order had been obtained for staying the proceedings. The debt and costs were paid on the 31st of October. On the 4th of November, the defendant was arrested on the same writ in Hampshire, and gave a bail-bond. A Judge's order having been obtained for cancelling the bail-bond, with costs, and those costs having been paid by the plaintiff, he obtained a rule calling upon his attorney to shew cause why he should not repay to him the sum so paid for costs:—*Held*, that the attorney had not under the circumstances been guilty of such a degree of negligence as to render him liable—at least on motion.

cordingly taxed, and the debt and costs (7*l.* 1*s.*) paid to Healey on the 31st of October; that, after the debt and costs had been so paid, viz. on the 4th of November, the defendant was arrested by the sheriff of Hants upon a *capias* indorsed for 105*l.* 16*s.* 7½*d.* and 15*l.* costs; that a Judge's order was thereupon obtained to cancel the bail-bond given upon that arrest for irregularity, with costs to be paid by the plaintiff; that these costs were afterwards taxed at 9*l.* 6*s.* 6*d.*; and that that sum was paid by the plaintiff to the defendant's agent.

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F. Kelly shewed cause, upon affidavits stating, that, on the 20th October, immediately after Mr. Justice Gaselee's order was pronounced, the plaintiff's then attorney (Mr. Healey) wrote to the under-sheriff at Winchester a letter to the following effect:—" *Meggs v. Binns*. The defendant has this day obtained a Judge's order for the stay of proceedings herein on payment of debt and costs to be taxed. Favor me with an account of your own and the officer's charges." That, on the 23rd of October, Healey received from the under-sheriff a letter in answer as follows:—" *Meggs v. Binns*. My charges for warrant, &c., are 8*s.*, and the officer's 1*l.* 1*s.*, which I shall feel obliged by your paying to my deputies, Messrs. Hicks & Braikenridge." That, on the 31st he attended with the defendant's agent before the prothonotary to tax the costs; that the prothonotary allowed the costs of a *bailable capias*, which costs were paid by the defendant without objection; that the defendant was not an attorney of this Court; that a bailable writ was issued at the express desire of the plaintiff, and transmitted to the sheriff of Hants on the 16th of October; that Healey, in his instructions to the under-sheriff, directed him to issue a warrant, but did not state the name or residence of any officer or other person to whom it was to be sent, but desired the under-sheriff to give the defendant credit for the 30*l.* paid on account.

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An action on the case will not lie against a party suing out a writ if he neglect to countermand it after payment of the debt and costs, at least malice must be averred—*Scheibel v. Fairbain* (a), *Page v. Wiple* (b); and the Court will not indirectly give a relief on motion that a party would not be entitled to in an action. Here, the attorney has done all that he was bound to do, to prevent the arrest: it was the defendant's duty to require a countermand.

Bompas, Serjt., in support of his rule.—It may be conceded that a defendant cannot complain of the absence of a countermand where he does not ask for it, and where the debt and costs are paid by mere arrangement between the parties: but the case is different where, as here, the payment is made under the order of a Judge; for, in that case, it is the plaintiff's duty to obey that order by staying the proceedings; he is guilty of a contempt if he does not do so. The plaintiff's attorney ought not to have issuedailable process at all.

TINDAL, C. J.—The parties having been before the prothonotary, and the costs ofailable process having been allowed, and not objected to, I think the time for moot-ing that objection is gone by. The only question therefore is, whether or not the plaintiff ought to recover from Healey, his late attorney, the 9*l.* 6*s.* 6*d.* which he (the plaintiff) has been compelled to pay to the defendant under the second Judge's order. To entitle the plaintiff to succeed in this motion, it should be made appear to us that the attorney against whom the application is made has been guilty of gross negligence. If any doubt exists, he has a right to have the matter submitted to a jury. Upon looking at the facts sworn to on both sides, I am of

(a) 1 B. & P. 388.

(b) 3 East, 314.

opinion that there is not such clear evidence of negligence on his part as will justify us in interfering in a summary manner. It appears that the writ issued on the 5th of September; that a considerable period was allowed to elapse before the defendant took any steps to effect a settlement; and that it was not until the 20th October that the order was obtained for staying the proceedings on payment of debt and costs. Upon this state of facts, the first observation that arises is, that the proceedings are not stayed upon an order of this description until the debt and costs are actually paid. The payment took place on the 31st of October: and the question is whether Healey, in omitting to countermand his instructions to the sheriff of Hants, has been guilty of such a degree of negligence as would deprive him of any defence to an action for a malicious arrest. The writ was sent to the under-sheriff of Hampshire, on the 16th of October. On the 20th, after Mr. Justice Gaselee's order was made, Healey wrote to the under-sheriff to ascertain the amount of his charges. At this time he had no right to interpose and prevent the writ being executed: it would have been a breach of his duty to his client so to have done. It is to be observed also that Healey had no knowledge of the officer, and therefore could only communicate with the under-sheriff. If he had written to the under-sheriff on the 2nd of November (the first being Sunday) to apprise him that the debt and costs had been paid, who is to say that the officer was so near at hand that the under-sheriff could have communicated with him to prevent the defendant's arrest on the 4th. Under these circumstances I cannot say that the attorney has been guilty of gross negligence. It is at least extremely doubtful whether this mere nonfeasance would make the attorney chargeable at all. Is the defendant himself to do nothing? I think it was his duty to ask for a countermand. At the most, I am of opinion (though even that

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is by no means clear) that there has been a very venial degree of negligence: but in that the defendant himself has been to a certain extent a sharer. The rule must be discharged with costs.

The rest of the Court concurring,

Rule discharged, with costs.

CLARKE v. STOCKEN.

A Judge's order for the revocation of the authority of an arbitrator, under the 3 & 4 Will. 4, c. 42, s. 39, cannot issue upon an ex parte application.

BY the 3 & 4 Will. 4, c. 42, s. 39, after reciting that it is expedient to render references to arbitration more effectual, it is enacted "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of Nisi Prius, in any action now brought or which shall hereafter be brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, *or by leave of a Judge*; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award."

This cause was referred to a barrister. The declaration was in assumpsit for goods sold and delivered.—Plea, the Statute of Limitations. The arbitrator having intimated an opinion adverse to the defendant, and having

declined to state the matters specially on the face of his award, the defendant stated a case for the opinion of the Attorney-General. That learned person thinking the arbitrator was mistaken in the opinion he had expressed (no award had been made), the defendant, upon an ex parte application, obtained from a Judge, in pursuance of the statute, leave to revoke his submission.

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Alexander, on a former day, obtained a rule calling upon the defendant to shew cause why the Judge's order should not be rescinded.

R. V. Richards shewed cause.—The Court has no authority to do that which this rule prays. The learned Judge who made the order was aware that the application to him was ex parte. There is nothing in the act to give power to the Court to interfere with the order of a Judge, or to review his discretion in the matter. [*Bosanquet, J.*—The question is, not whether the Court has power to review the decision of the Judge, but whether the Judge had power to make the order that has been obtained from him, upon an ex parte statement.] There are many cases wherein Judge's orders are obtained upon ex parte applications: as, where it is sought to arrest a defendant a second time for the same cause of action, or in trover, &c. If the leave of the Court or a Judge to revoke the submission must in all cases be made on a rule nisi or upon summons, and upon hearing both parties, the rule nisi or the summons will operate as a notice to the arbitrator to make his award. Besides, if the Court rescind this order, will the authority of the arbitrator, which has been put an end to by the order, revive? If not, the rescinding of the order will be useless.

TINDAL, C. J.—The only question now before us is whether or not the order that has been made by the

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learned Judge, giving the defendant leave to revoke his submission in the case, ought to be set aside. Upon the best construction I am able to put upon the statute, I think the order should be set aside. The 39th section of the 3 & 4 Will. 4, c. 42, takes away the right to revoke the submission, except on leave obtained from the Court or a Judge. It appears to me that no order can be pronounced by the Court or by a Judge unless both parties have been heard. Inasmuch therefore as in this case the order was obtained in the absence of the plaintiff, it is the same thing as if the order had never been pronounced at all. What may be the effect of rescinding the order will be seen hereafter.

PARK, J.—In upholding an order obtained as this has been, we should be acting against the first principle of justice. I have always understood, that, before a party's rights are to be concluded by a rule or order, an opportunity must be given to him to be heard. The case of arrest is different: there, if the defendant had notice of the application, he would of course abscond. But, with respect to the application for leave to revoke a submission operating as notice to the arbitrator to expedite the publication of his award, that supposes gross corruption and partiality in him, and that I never will impute to any arbitrator, whether lawyer or layman.

VAUGHAN, J.—The provision in question is a very wholesome one, and highly conducive to justice and the saving of expense to suitors. Cases formerly were frequent where one party having contrived to learn the sense of the arbitrator, the submission was immediately revoked. Now, the revocation can only be effected by the order of the Court or of a Judge; and according to every principle of law and justice, this leave should never be granted *ex parte*. With respect to the authority of the

Court to review the decision of the Judge, I think it clearly exists. Seeing the quantity and importance of the business that is now transacted at chambers, I think it of great importance that there should in all cases be a liberty of appeal.

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BOSANQUET, J.—I am of opinion that the authority given by the act to the Court or a Judge is in no case to be exercised without notice to the opposite party. It is admitted on all hands, that, before this statute passed, the frequent and groundless revocation of the authority of the arbitrator when he was prepared to make his award, was an evil that called for a remedy. It seems to me, that, if parties may now go before a Judge, and upon an *ex parte* statement obtain an order to revoke the submission, all the evils that existed under the old practice will be restored. It is suggested that there might be danger in giving notice of the application, inasmuch as it would put the opposite party on the alert, and enable the arbitrator to defeat the application by making his award *instantanter*. The Court, however, cannot presume that the arbitrator will act corruptly. If such a case were to arise, the proper course would be to apply to the Court to set aside the award.

Rule absolute.

R. V. Richards afterwards obtained a rule nisi to revoke the submission; against which cause was shewn by *Alexander*; and Sir *F. Pollock* and *Richards* were heard in support. The ground upon which it was suggested that leave to revoke should be given was, that the arbitrator had declined to state specially upon the face of his award the facts and grounds of his decision, which the submission *authorized* him to do.

Quære whether the refusal of an arbitrator to state the grounds of his decision upon the face of his award, is enough to induce the Court to grant leave to revoke his authority, under the 3 & 4 W. 4, c. 42, s. 39.

The Court, expressly disclaiming to lay down any gener-

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al rule upon the subject, but holding the application to be answered by the affidavits filed by the plaintiff,

Discharged the rule.

HOULDITCH and Another v. SWINFEN.

A motion to reverse an outlawry cannot be entertained, unless it expressly appear by the affidavits that the attorney making the application is duly authorized by the outlaw.

BOMPAS, Serjt., on a former day, obtained a rule calling upon the plaintiffs to shew cause why the outlawry in this case should not be set aside, on the grounds that the affidavit to hold to bail was defective, and that the defendant had to the knowledge of the plaintiff been abroad during the whole time that the proceedings in the action were pending.

Petersdorff, contra, submitted that the party was not in a situation to be heard, inasmuch as it did not appear upon the face of the affidavits upon which the motion was founded that the attorney who assumed to act for the defendant was properly constituted by the defendant. He cited *Plunkett v. Buchanan* (a), where it was held that an attorney making an affidavit in support of an application to reverse an outlawry against a defendant who does not appear personally, must shew in express terms that he is duly authorized by the outlaw to make the application.

The Court thinking the authority of *Plunkett v. Buchanan* to be decisive,

Bompas submitted that the rule should be discharged without costs, inasmuch as it would appear rather anomalous to visit with costs a party whom the Court held not to be before them.

(a) 3 B. & C. 376; 5 D. & R. 625.

PER CURIAM.—The party should have come properly armed: the rule must be discharged with costs.

Rule discharged, with costs.

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THE motion was on a subsequent day renewed, upon amended affidavits.

The summons and distringas given by the statute 2 Will. 4, c. 39, are not the only mode of proceeding to outlawry.

Aailable capias, upon which the defendant was outlawed, having issued upon a defective affidavit—The Court, on motion, reversed the outlawry on payment of costs, the defendant entering a common appearance.

Petersdorff shewed cause.—To entitle the defendant to make his rule absolute it is incumbent on him to shew that the affidavit of debt (which in this case, it may be conceded, is irregular), is an essential ingredient in the proceedings to outlawry. That, however, is not so. It may be filed after the proceedings to outlawry are complete. In *Tidd's Practice* (a), it is said; "It is not necessary that the affidavit should be made *before* the outlawry, nor the sum sworn to be indorsed on the capias utlagatum; but it is sufficient if there be an affidavit before the defendant is discharged: the Court having determined that process of outlawry is not within the statutes for preventing frivolous and vexatious arrests." The defendant is, besides, in no condition to make this application, he has no locus standi in judicio, until he has appeared—*Summervil v. Watkins* (b), *Solly v. Forbes* (c).

Bompas, Serjt., in support of his rule.—Notwithstanding the cases cited, it is clearly not necessary for the defendant to appear before moving to reverse the outlawry. In *Garland v. Noble* (d), *Plunkett v. Buchanan*, *Bryan v. Wagstaff* (e), *Pigou v. Drummond* (f), no appearance

(a) 9th edit. p. 136—citing *Fowney v. Allen*, M. 10 G. 2.

(b) 14 East, 536.

(c) 2 Moore, 567.

(d) 1 Moore, 187.

(e) 8 D. & R. 208; 5 B. & C. 314; R. & M. 329; 2 C. & P. 125.

(f) 1 New Cases, 154; 1 Scott, 264.

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was entered: and in *Graham v. Henry*(g), it was expressly held that the defendant need not appear before he moves to reverse an outlawry.

TINDAL, C. J.—There are many cases where the Courts have imposed upon the party the entering of an appearance or the putting in of special bail as a condition of the reversal. But, where the affidavit is defective, it would seem very hard to compel the defendant to put in bail before he could be permitted to come to the Court and say that the plaintiff is not entitled to have bail at all. I think the defendant ought to be allowed to have the outlawry reversed on entering an appearance, and upon payment of costs.

Bompas.—The defendant ought not to be compelled to pay the plaintiff the costs of the proceedings that have been irregularly taken against him. The plaintiff ought not to have issued a *capias*: he should have proceeded by *distringas* in the mode pointed out by the statute 2 Will. 4, c. 39—*Fraser v. Case*, 2 M. & Scott, 720.

TINDAL, C. J.—Notwithstanding the defective affidavit, the *capias* is still a valid writ. I do not find any words in the statute 2 Will. 4, c. 39, to compel a party to pursue the mode pointed out by that act instead of proceeding by *capias*, the object of which is that he may have the security of bail. This seems to me to be the ordinary case of a party coming by motion to reverse an outlawry. And this is uniformly done only on payment of costs. The Court generally superadds that the party shall put in bail to the amount sworn to; but, inasmuch as the affidavit here is defective, that condition may be dispensed with. The justice of the case will I think be attained by

(g) 1 B. & Ald. 131.

setting aside the outlawry on payment of costs, and on the defendant's entering an appearance.

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The rest of the Court concurring,

Rule absolute accordingly.

LYNG v. SUTTON.

THIS cause and all matters in difference between the parties were referred to an arbitrator. The arbitrator, in the course of the last vacation, directed a verdict to be entered for the plaintiff on the second count of the declaration, with 30% damages.

Where a cause is referred and a verdict entered, a motion to impeach the award must be made within the first four days of the following term.

Mansel, on a former day, obtained a rule nisi to refer back to the arbitrator, on the ground that he had omitted to make any award touching a point in equity which was one of the matters in difference referred to him.

Manning, contra, objected that the application, not having been made within the first four days of the Term, could not be entertained. He relied on *Borrowdaile v. Hitchener* (a), where it was held, that, if a verdict for a plaintiff be taken at Nisi Prius, subject to the award of an arbitrator, and the award be made before the Term, the defendant can only impeach it within the first four days of the Term.

Mansel, in support of his rule, submitted that the rule upon which *Borrowdaile v. Hitchener* turned applied only to cases where it was sought to impugn the verdict: whereas, here, if the equitable jurisdiction of the Court failed the plaintiff, he would altogether lose his remedy

(a) 3 Bos. & Pull. 44.

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in equity for that upon which the arbitrator had omitted to adjudicate.

PER CURIAM.—If the point suggested was intended to to be referred, and by mistake was not referred, the plaintiff is not concluded. The application should have been made within the first four days. We ought to be very tenacious of relaxing the rule.

Rule discharged, without costs.

HOOPPELL v. LEIGH.

Upon writs of inquiry before the sheriff, where the damages are under 20*l.*, the costs are taxed on the same scale as upon trials before the sheriff.

THIS was an action of covenant for non-repair of the demised premises. The defendant suffered judgment by default, and the damages were assessed upon a writ of inquiry before the sheriff of Exeter, at 13*l.* 12*s.* The prothonotary having taxed the costs according the reduced scale directed by the rule of Hilary Term, 1834(*a*), applicable to trials before the sheriff.

Hoggins, for the plaintiff, moved that the officer might review his taxation. He contended that the directions in question did not apply to writs of inquiry.

The prothonotaries stated that it was the practice in the office to tax the costs upon writs of inquiry before the sheriff, where the damages were less than 20*l.*, upon the same principles as in cases tried before the sheriff under the statute 3 & 4 Will. 4, c. 42, ss. 17—20.

THE COURT said that the directions referred to did not

apply to writs of inquiry; but inasmuch as it appeared to have been the practice in the office to tax such costs upon the like principle, the rule was

Refused.

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COLE and Another v. LE SOUEF and Another.

ASSUMPSIT for money paid, for interest, and for money due upon an account stated.

Pleas—first, non assumpsit—secondly, as to 173*l.* 5*s.* parcel of the sums of money in the first and third counts mentioned, and the promises in the declaration mentioned so far as related to the said sum of 173*l.* 5*s.*—that, therefore, and before the plaintiffs were retained or employed as thereafter mentioned, certain goods of a large value, to wit, of the value of 5000*l.*, had been and were at London shipped and loaded in and on board of a certain ship or vessel called the Pomona, to be carried and conveyed therein from London aforesaid to Falmouth, and from thence on a voyage to a certain place beyond the seas, to wit, to Oporto, and that the defendant, before and at and after the time of retaining and employing the plaintiffs as thereafter mentioned, were interested in the said goods to a large value and amount, to wit, to the value and amount of all the monies which they retained and employed the plaintiffs as thereafter mentioned to cause to be insured thereon; of all which several premises the plaintiffs before and at the time of their being retained and employed as thereafter mentioned, to wit, on &c., had notice: that, before and at the time when the plaintiffs were retained and employed as thereafter mentioned, the plaintiffs were insurance brokers, and used, exercised, and carried on the business and employment of insurance brokers; and thereupon, theretofore, to wit, on

In assumpsit for money paid to the use of the defendants, they pleaded specially circumstances shewing that the policy of insurance in respect of which the payments were made had been so framed as to be utterly unavailing. Upon special demurrer, on the ground, amongst others, that the plea was argumentative and amounted to the general issue—The Court inclined to think the plea good, but allowed the plaintiff to withdraw his demurrer and reply de novo, without costs.

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&c. last aforesaid, the defendants, at the plaintiffs' request, retained and employed the plaintiffs as insurance brokers and agents in that behalf, for compensation and reward to them in that behalf, to effect and cause to be made for the benefit of the defendants an insurance to the amount of a certain sum of money, to wit, 2000*l.*, upon the said goods in the said ship or vessel, upon and for the said voyage from Falmouth to Oporto; of which said retainer and employment the plaintiffs then accepted, and in consideration of the premises then promised the defendants to do and perform their duty as such brokers and agents as aforesaid in that behalf; and thereupon it then became and was the duty of the plaintiffs as such brokers and agents of the defendants as aforesaid, to use due and proper care and skill in and about the effecting and causing to be made such insurance as aforesaid: that the plaintiffs, well knowing the premises and that the said goods had been shipped and loaded at London as aforesaid, and not at Falmouth as aforesaid, but neglecting their duty in that behalf did not nor would use due or proper skill in and about the effecting and causing to be made the same insurance, but wholly neglected so to do, and, on the contrary thereof, as and for the purpose of effecting such insurance as aforesaid, carelessly, negligently, unskilfully, and improperly effected and caused to be made two policies of assurance, to wit, &c., which policies, by reason of the carelessness, negligence, and want of skill of the plaintiffs in that behalf, were worded and expressed in such words and manner as not to be, and the same were not, nor was either of them, applicable or adapted to an insurance upon the said goods or any goods shipped and loaded in and on board of the said ship or vessel at London aforesaid; by means whereof the said policies of assurance did not nor did either of them operate, and were not nor were either of them an insurance upon the

said goods or upon any part thereof, and thereby the defendants were prevented from having and never had any insurance on the said goods or on any part thereof, or any indemnity, benefit, or advantage whatever of or from the said policies of assurance, and the said goods, by means of the premises, and of the carelessness, negligence, and want of skill and improper conduct of the plaintiffs as such insurance brokers and agents of the defendants in that behalf as aforesaid, were wholly uninsured of or for the said voyage from Falmouth to Oporto: and that the said sum of 173*l.* 5*s.* was and is the amount of certain premiums of insurance and expenses upon, of, and relating to the said policies of assurance, and paid and incurred by the plaintiffs in and about and relative to the same and the effecting and causing the same to be made—verification.

To the first plea the plaintiffs added the similiter, and to the second demurred specially, assigning for causes—that the defendants in and by their said second plea specially pleaded and relied upon matter amounting in effect to a general traverse of the promise laid in the declaration as far as such promise related to the causes of action in the commencement of that plea referred to—that the plea was a multifarious, argumentative, and insufficient mode of pleading the plea of non assumpsit to the last-mentioned causes of action—that the said second plea concluded with a verification and purported to be a special plea in avoidance of the last-mentioned causes of action, without in any manner confessing even a *prima facie* or colorable title or right of action in the plaintiffs—that the said second plea did not state any fact which arose after the causes of action which it professed to answer had accrued to the plaintiffs, nor did it contain any matter of law in answer to the last-mentioned causes of action, nor did it state any matter of law or of fact in avoidance

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of any or of any part of the causes of action in the declaration alleged—that the said second plea contained material allegations at variance and inconsistent with each other, inasmuch as it contained averments shewing that the sum of 173*l.* 5*s.* therein and in the declaration mentioned was paid by the plaintiffs as and for certain premiums of insurance and expenses paid and incurred in consequence of the retainer of the defendants, and yet attempted to state and to tender for issue certain facts from which it was sought to be inferred that the same payments and expenses were made and incurred in the plaintiffs' own wrong, and without any request, retainer, or instruction of or from the defendants—that in and by the said second plea it was admitted that there was an account stated between the plaintiffs and defendants as in the declaration alleged, and it was also implied and admitted that the said sum of 173*l.* 5*s.* was an item in such amount, and that upon such account a balance to that amount remained to the credit of the plaintiffs, and yet in and by the said second plea there was not shewn any matter or matters in avoidance of or as a set-off against the said item or sum of 173*l.* 5*s.*, but in a subsequent part of the plea it was attempted to be shewn that the said sum of 173*l.* 5*s.* never was a valid debt in account or otherwise from the defendants to the plaintiffs, and it was stated in effect, notwithstanding the implied admission of the said account and of the said sum of 173*l.* 5*s.* being such balance as aforesaid, that the said sum of 173*l.* 5*s.* consists of certain payments made by the plaintiffs in their own wrong, and not at the request of the defendants, and for which said sum of 173*l.* 5*s.*, or any part thereof, it was attempted in and by the said second plea (but in an argumentative, indirect, and insufficient manner) to be shewn that the defendants never were or ought to be liable to the plaintiffs—and that the said

second plea contained various allegations upon no one of which could the plaintiffs take issue without thereby admitting the truth of the other allegations in the plea, which, though wholly false or unfounded, would materially embarrass the plaintiffs on the trial of the cause, and in the recovery of their demand.—Joinder.

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Manning, in support of the demurrer.—The plea is bad inasmuch as it does not confess and avoid the matters alleged in the declaration, and merely amounts to the general issue. It does not fall within either of the cases that form an exception to the general rule that that which may be given in evidence under non assumpsit cannot be pleaded specially. These exceptions are, first, where the matters alleged in the declaration are confessed by the plea and avoided by matter ex post facto; secondly, where the matters alleged are avoided by matter of law, that is by matters of fact involving matters of law—*Carr v. Hinchcliffe* (a), *Maggs v. Ames* (b). The new rule of Hilary Term, 4 Will. 4, s. 1, which provides, that, “In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law”—leaves the matter just where it was. Here, the plaintiffs declare for money paid to the use of the defendant. Under non assumpsit the defendants might have given in evidence any thing to shew that the money was not in fact paid to their use. [*Tindal*, C. J.—You might have put in a replication denying the whole of the matters alleged in the plea.] It may admit of great doubt whether we could safely have replied de injuria. We might have been em-

(a) 7 D. & R. 42; 4 B. & C. 547.

(b) 1 M. & P. 294; 4 Bing. 470, nom. *Maggs v. Anson*.

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barrassed by the admission of some of the facts alleged in the plea. [*Tindal*, C. J.—The defence is, that the policy in respect of which the alleged payments were made was so framed by the plaintiffs as to be utterly useless to the defendants: if so, why may not that form the subject of a special plea? I think you had better amend.]

Manning expressed his willingness to amend without costs: but this was not acceded to by the other side.

Barstow, contra.—It is by no means clear that this would not have been a good plea before the new rules. *Magg v. Ames* is an authority in its favour. But, at all events, since those rules, there can be no doubt. The general policy of the new rules was to encourage the putting of defences specially upon the record. Under non assumpsit, the proposed defence would have been excluded. The third rule, in assumpsit, proves that, “In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or *voidable in point of law, on the ground of fraud or otherwise*, shall be specially pleaded.” Here the transaction is *voidable* in consequence of the neglect of the defendants.

TINDAL, C. J.—The plea admits an account stated in point of fact after the transaction was closed. For anything that appears, the defendants are not damnified. I think the plaintiffs should have leave to withdraw their demurrer, and reply *de novo*, without payment of costs.

Rule accordingly.

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HOLLIS v. FREER and Others.

REPLEVIN.—The defendants prayed judgment of the original writ issued in this behalf, because they said that the plaintiff before and at the time of the suing forth of the said original writ in this behalf was and still is married to one John Osborne then and yet her husband, who is still living: and this the defendants were ready to verify: they then proceeded to avow for 146*l.* rent in arrear for two half-years' rent under a demise at the yearly rent of 187*l.*

The plaintiff, in replevin, marrying after plaint in the county court and before its removal by re. fa. lo.:—Held, that the writ abated.

The plaintiff replied that the suit was commenced by plaint and without any writ in the county court of the sheriff of Stafford, and that after the same was so commenced as aforesaid and while it was pending in that Court, the defendants, for the purpose of removing the same therefrom into this Court, issued and prosecuted a certain writ of our lord the King, being the writ in the plea mentioned, called a re. fa. lo., &c, &c—verification.

General demurrer and joinder.

Addison, in support of the demurrer.—The replication is no answer to the plea, and entirely admits the defence therein contained: and the plea itself is unexceptionable—*Milner v. Milnes* (a). In *Morgan v. Painter* (b), it was held, that, if the plaintiff take husband after suing out the writ, and before the declaration, the defendant cannot give her coverture in evidence under the general issue, but must plead it in abatement. Whether the marriage were before or after the commencement of the action is immaterial.

R. V. Richards, contra.—The plaint was levied by the

(a) 3 Term Rep. 627.

(b) 6 Term Rep. 265.

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plaintiff in her maiden name, the re. fa. lo. was sued out, not by her, but by the defendants; and the plaintiff's marriage took place after the commencement of the suit in the county court, and before the removal of the plaint to this Court by re. fa. lo. The consequence of this demurrer being allowed will be the forfeiture of the replevin bond; for, the suit cannot be continued. The general rule, as laid down in *Bac. Abr. Abatement* (G.), is, that, where the action has been properly commenced, the defendant cannot by a plea in abatement avail herself of her subsequent marriage to defeat the action. And in *Haddock v. Howard, Barnes*, 355, where the defendant, whilst a feme sole, was arrested in the Palace Court, and a day or two after the arrest married, and then removed the plaint by hab. corp. into this Court, and pleaded her coverture in abatement; the Court set aside the plea. Here, the situation of the plaintiff is altered by the removal of the plaint by the defendants: and the true question is, whether they can be permitted so to alter the situation of the plaintiff as to work a forfeiture of the bond. [*Tindal*, C. J.—Is it not a virtual compliance with the bond?] By the marriage of the plaintiff, the suit is abated: it must be commenced de novo.

PER CURIAM.—This case must be governed by *Morgan v. Painter*, where it was held, that, if the plaintiff take husband after suing out the writ and before declaration, the defendant cannot give her coverture in evidence under the general issue, but must plead it in abatement. When the parties are in Court by a writ of re. fa. lo., it is the same as a new cause of action: that writ is subject to all the modes of being abated that any other writ is subject to. It is said that the plaintiff is placed in such a situation by the re. fa. lo. as to work a forfeiture of the replevin bond, inasmuch as the suit cannot now be prosecuted in the county court with effect and without delay, according

to the condition. That may be so: but, if it be, it is a consequence which follows from the legal effect of the *re. fa. lo.*, and which we cannot help. The judgment must be that the writ abates.

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Rule accordingly.

GRAHAM v. BEAUMONT.

MARTIN, for the defendant, obtained a rule nisi for costs under the 43 Geo. 3, c. 46, s. 3, on the ground that the defendant had, without reasonable or probable cause, been arrested for 600*l.*, and the plaintiff had only recovered 550*l.* The defendant had paid 500*l.* into Court.

Bompas, Serjt., shewed cause.

The defendant (in person), in support of the rule, objected that the affidavit upon which cause was shewn had been sworn after the day upon which the rule was due.

BOSANQUET, J., referred to a note on the case of *Haar v. Hill* (a), where it is said that "where no particular time is prescribed for filing the affidavits on which a party shews cause, they may be sworn and filed at any time before shewing cause, though after the day appointed by the rule;" and to *Tilley v. Henley* (b), where it was expressly held that affidavits sworn before the time of shewing cause, although after the time mentioned in the rule nisi, may be read, unless by the terms of the rule it be required that they shall be filed by a particular day; and *Braine v. Hunt* (c), where it was held that affidavits on shewing cause are in time if sworn at any time before cause is shewn.

It is no objection to an affidavit used in opposing a motion, that it has been sworn after the day upon which the rule was due, if it be sworn before cause actually shewn.

On motions for costs under the 43 Geo. 3, c. 46, s. 3, the discretion of the Court is not to be governed by the amount of the verdict.

The objection being overruled—

(a) 1 Chit. Rep. 27.

(b) 1 Chit. Rep. 136.

(c) Ante, Vol. 2, p. 391.

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The defendant proceeded to support his rule—contending that the amount of the verdict was *primâ facie* proof of the want of reasonable and probable cause to arrest for the amount sworn to.

TINDAL, C. J.—The statute 43 Geo. 3, c. 46, s. 3, was not intended to apply to a case where the plaintiff might reasonably be supposed to believe that his debtor owes him the sum for which he arrests him. It must not be a mere measuring cast. Neither do I agree that the verdict of the jury is that by which our discretion is to be guided.

The rest of the Court concurring—

Rule discharged.

BEASLEY v. CLARKE.

In trespass, the defendant justified the trespasses complained of under a right of way over the closes in which &c., claiming the way as having been used for forty years by the occupiers of his farm as of right and without interruption. The plaintiff replied, traversing that the occupiers of the defendant's farm had for and during the full term of forty years and up-

THIS was an action of trespass brought for the purpose of trying a right of way. At the trial before *Gaselee, J.*, at the last Summer Assizes at Lincoln, a verdict was found for the plaintiff, damages one shilling. In the following Michaelmas Term, *Goulburn, Serjt.*, obtained a rule nisi for a new trial on the grounds of misdirection, and that the verdict was against the evidence. Cause was shewn against the rule in Hilary Term by *Adams, Serjt.*, and *Humfrey*; and *Goulburn, Serjt.*, and *Amos*, were heard in support of it.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court—

wards, as of right, had and used the way without interruption:—*Held*, that, under this application, the plaintiff was at liberty to shew the character and description of the user of the way during any part of the time; as, that it was used by stealth; or in the absence of the occupier of the close and without his knowledge, or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right: the words of the fifth section of the 2 & 3 Will. 4, c. 71, "not inconsistent with the simple fact of enjoyment," being referable to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised "as of right."

In this case, the defendant justifies the trespasses complained of in the declaration under a right of way over the closes in which &c. In his second plea, he claims the way as having been used for twenty years without interruption by the occupation of his farm; and, in the last plea, as having been used for forty years by the occupiers of the same farm as of right and without interruption. To the second plea the plaintiff replies, "that when the occupiers of the defendant's farm used the way, they used it with the leave or licence, sufferance, or permission of the occupiers of the plaintiff's closes;" which leave and licence is traversed by the defendant in his rejoinder. To the last plea the plaintiff replies by traversing that the occupiers of the defendant's farm have for and during the full term of forty years and upwards as of right had and used the way without interruption. The jury found a verdict for the plaintiff upon both these pleas; and the question arises before us on a motion to set aside the verdict as well upon the ground of misdirection as also that it is against the weight of the evidence. The misdirection complained of is, that the learned Judge, upon the issue joined on the last plea, directed the jury to find a verdict for the plaintiff if they believed the evidence that a former occupier of the defendant's farm had applied for and obtained leave to use the way in question, and that he had paid an acknowledgment for such user. It being contended on the part of the defendant, that, if such evidence was admissible at all under the 5th section of the statute 2 & 3 Will. 4, c. 71, at all events it was not admissible under a traverse of the user for forty years, but that the plaintiff ought to have replied that the way was used by leave and licence, as he had done to the plea which claims the way for twenty years. This objection on the part of the defendant rests on the 5th section of the act above referred to, by which it is enacted, "that, if the other party intends to rely on any cause or matter of fact or of law not inconsistent with

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the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." The question, therefore, turns upon the construction and meaning of this clause—whether by the expression that any matter must be pleaded which is "not inconsistent with the simple fact of enjoyment," the legislature intended to compel the plaintiff to reply in all cases the special facts and circumstances which shew that the way was not used under a claim of right; or whether it only meant to compel the plaintiff to reply all collateral matters which may defeat the right of way. And, whatever might have been our opinion, if the matter had been *res integra*, we think the interpretation which has been put upon this clause by the Court of King's Bench in the recent case of *Tickell v. Brune*, may be held to be the construction to be put upon the statute: and, according to that construction, we held, that, under a replication denying that the defendant had used the way for forty years, as of right and without interruption, the plaintiff is at liberty to shew the character and description of the user and enjoyment of the way during any part of the time; as, that it was used by stealth, or in the absence of the occupier of the close and without his knowledge, or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right: the words of the fifth section, "not inconsistent with the simple fact of enjoyment," being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised "as of right." The case of *The Monmouth Canal Company v. Harford*, 5 Tyr. 68, in the Court of Exchequer, is another authority for the same construction of the act. We therefore think the evidence objected to was admissible under the traverse of the last plea: and it

would certainly be extremely inconsistent if the defendant should be allowed to insist upon a verdict in his favour for the right of way when claimed by him as of right and without interruption for the last *forty* years, whilst upon the same record the plaintiff should be entitled to retain the verdict in his favour upon the issue raised on the second plea, establishing the same way to have been used for the last twenty years by the leave and licence of the plaintiff.

Upon the other ground of objection, that the verdict is against evidence, we can only observe there was evidence on both sides for the consideration of the jury, and we cannot so clearly see that it preponderated in favour of the defendant as to induce us to disturb the verdict.

Rule discharged.

FOOT, Demandant, SHIREFF, Tenant.

B. ANDREWS, on a former day, on the part of the tenant, obtained a rule nisi to set aside the writ of grand cape issued herein, and all proceedings on this writ of right, for irregularity, with costs—upon affidavits stating that the Vice Chancellor had (on the grounds stated in the report of a former motion in this case—*Foot v. Shireff*, ante, Vol. 4, p. 652), set aside the original writ, with costs; and that the decree of the Vice-Chancellor had been affirmed, on appeal, by the Chancellor.

Where an original writ of right had been set aside by a Court of equity, after the issuing of a grand cape—this Court set aside the latter writ *without costs*, the demandant having previously given notice that he abandoned it.

Bompas, Serjt., contra, admitted that the grand cape must be set aside; but contended that the tenant was not entitled to the costs of the rule, it appearing by the affidavits filed in answer to the rule, that the grand cape had issued after the motion in this Court and before the application to the Vice-Chancellor, and that, before this motion was made, the demandant's attorney had given notice to the tenant's attorney that the grand cape was abandoned.

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Ten.

B. Andrews, in support of his rule, submitted that, inasmuch as the grand cape had issued irregularly, and it was necessary for the tenant to come to the Court to have it set aside, he was entitled to costs—Com. Dig. *Essoign*, (C).

PER CURIAM.—This is a motion in a real action in which no costs are by the general rule allowed. Still, however, interlocutory costs even in writs of right are in the discretion of the Court. But, under the circumstances disclosed by the demandant's affidavits, we think the tenant is not entitled to the costs of this motion. He had notice that the grand cape was abandoned. He now comes only to clear the title.

Rule absolute, without costs.

WESTON v. FOSTER.

Where a cause is tried in vacation, a motion in arrest of judgment, in this Court, must, pursuant to the old practice, be made within the first four days of the ensuing term.

ASSUMPSIT for money lent, &c.—The cause was tried at the sittings in London after Trinity Term last, when a verdict was found for the plaintiff. In Michaelmas Term, a rule nisi was obtained for a new trial, on the ground that the promise declared on was extinguished by a security of a higher nature, a bottomry bond, with maritime interest, given for the same advances. The rule was argued and discharged in the early part of the present term, and afterwards—

Taddy, Serjt., obtained a rule nisi for arresting the judgment.

Butt, contra, relied upon 1 Reg. Gen. H. T. 2 Will. 4, s. 65(a), by which it is provided that “no motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in

(a) Ante, Vol. 1, p. 191.

any case after the expiration of the term, provided the jury process be returnable in the same term;" and which rule is in affirmance of the previous practice in this Court and in the Exchequer, disaffirming that of the King's Bench, where the motion in arrest of judgment might be made at any time before judgment was actually given.

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Taddy, Serjt., in support of his rule.—The rule referred to can only apply to causes tried in term: if the object of the rule were otherwise, the words used do not attain that object. This case, therefore, must stand upon the old practice. When the jury process was returnable in the same term in which the trial took place, the party was bound to move in that term, even though four days did not remain; but when the trial took place out of term, the party was allowed to move at any time before judgment was actually signed. In *Lyte v. Rivers* (a), "*Hayward*, for the defendant, offered to move in arrest of judgment July 5. But per Cur. the motion comes too late. Writ of hab. corp. jur. was returnable 15 Trin., and the motion in arrest of judgment ought to be made before or upon the appearance day of that return, which was July 4." [*Tindal*, C. J.—That case clearly applies to a case in term.] Otherwise the motion in arrest of judgment could never be made at all unless on the first day of the term succeeding the trial. [*Tindal*, C. J.—The universal practice is, to make the motion within the first four days.] The point has never been considered in this Court; but it has in the King's Bench in *Taylor v. Whitehead* (b). There, *Lee* objected that a motion to enter judgment non obstante veredicto had been applied for too late, for that it was in the nature of a motion in arrest of judgment: and he said he had always understood the practice to be that such a motion could not be made after a new trial had been applied for, unless the Court upon granting the rule for a new trial should have given leave,

(a) Barnes, 445.

(b) Doug. 745.

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if that should be discharged, to follow it by a motion in arrest of judgment. It seemed, he said, very unreasonable that a party should be permitted to avail himself in so late a stage of the cause of an objection that might have been taken in the first instance by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expense and vexation of the trial and the motion to set aside the verdict would have been avoided. In answer to this it was observed by *Dunning* that it would be extremely absurd if an objection should be stated to the Court, and they should be convinced that the party had not by law a right to judgment in his favour, that they should yet be necessitated by any rule of practice to pronounce an erroneous judgment in his favour, and so force a party to bring a writ of error. After some consideration, and conference with the Master, the Court declared their opinion that a motion in arrest of judgment may be made at any time before judgment is entered up, and that the present motion, being of the same nature, was not too late. In *Tidd's Practice* (a), the practice is thus stated—"The motion in arrest of judgment, or for judgment non obstante veredicto, &c., may be made in the King's Bench at any time before judgment is given; though a new trial is previously moved for. In the Common Pleas, the motion in arrest of judgment must be made before or on the appearance day of the return of the habeas corpora juratorum (citing for this *Lyte v. Rivers*, Barnes, 445, which was the case of a trial in term). In the Exchequer, the motion in arrest of judgment must, it seems, be made within the first four days of the next term after the trial; and it cannot be made after an unsuccessful motion for a new trial"—citing *Lane v. Crockett*, 7 Price, 556: Man. Exch. Prac. 353, contra. Inasmuch, therefore, as the practice in this Court appears by no means established in accordance with the supposition in *Tidd*, and the reasoning in the case in *Douglas*

(a) 9th edit. p. 928-9.

seems conclusive, and the permitting the motion would be mercy to the parties, as the expense of a writ of error may thereby be avoided, the motion ought to be allowed.

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TINDAL, C. J.—The present case either falls within the new rule or must be governed by the old practice of the Court. If it falls within the new rule (and I am not by any means clear that it does), the motion in arrest of judgment, where the cause has been tried at the sittings *out* of term, must be made within the first four days of the term ensuing the trial. But, supposing the rule to apply only to causes tried at the sittings *in* term, then it will become necessary for us to ascertain what was the former practice upon the point in this Court. It appears to me from the authorities to which our attention has been called, and from a general understanding of the practice, that the defendant had only the first four days of the term in which to move in arrest of judgment. With respect to the case of *Taylor v. Whitehead*, I do not think it entitled to so much attention as it would have merited had it been a direct application to the Court upon the point. That was an action of trespass, in which the defendant had pleaded the general issue and a justification under a claim of a right of way. The issue taken upon the first plea was found for the plaintiff, that upon the second for the defendant: the plaintiff, therefore, was entitled to the general judgment. A motion for a new trial was negatived; and the plaintiff then applied for leave to enter judgment non obstante veredicto upon the second issue. A plaintiff may apply at any time: he is not limited to make his application within the first four days. And the Court there incidentally liken the case to that of a motion in arrest of judgment. The motion before the Court did not call for a decision upon the point for which it is now cited: therefore I do not think that case a decisive authority for the position. And, when I learn from my Brother *Park*, whose long experience

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must have rendered him very familiar with the practice, that he has always understood the invariable practice to be to move in arrest of judgment within the first four days of the term following the sittings at which the cause is tried, I am still less disposed to be influenced by *Taylor v. Whitehead*. I think this rule must be discharged.

PARK, J.—I am of the same opinion. Speaking from an experience of nearly fifty years, I say, without hesitation or doubt that the practice, in this Court at least, has always been as has been stated by his Lordship. In the King's Bench, too, in my recollection, it was the practice, on obtaining a rule for a new trial, also to state the ground for a motion in arrest of judgment, and obtain a reservation of leave to make the motion in that form, in case the rule for a new trial should ultimately be discharged. When I came into this Court, I found the course here was, to take the rule in the alternative—for a new trial, or in arrest of judgment. I abstain from offering any opinion upon the 65th rule of Hilary Term, 2 Will. 4; it being somewhat doubtful whether the language of that rule does go any further than is suggested. It is, however, enough to say, that, upon the old practice, this motion is out of time.

VAUGHAN, J.—On the construction of the rule referred to, it is very doubtful whether it applies to any other than trials in term.

BOSANQUET, J.—The old practice is clearly ascertained: but, whatever the intention of the framers of the new rule might have been, the language does not seem to convey it very clearly. Much countenance is given to the argument of my Brother *Taddy* by the modern books of practice.

Rule discharged.

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FINCH v. BROOK.

TO debt in a County Court for 33s., the defendant pleaded *nil debet* except as to 1*l.* 12s. 5*d.*, and as to that sum a tender. The jury found that the defendant did not owe anything except as to the 1*l.* 12s. 5*d.*, and as to that sum, they found specially certain facts, upon which judgment was entered for the defendant in the County Court. Upon a writ of false judgment, this Court reversed the judgment of the Court below, holding that the circumstances found by the jury did not amount to a tender. The Court pronounced a rule giving liberty to the plaintiff to enter up judgment for the debt and also for the costs in the Court below, to be taxed by the prothonotary. On the 9th December, 1835, the costs of the plaintiff in the Court below were according to the above rule taxed, and the prothonotary made his allocatur for 12*l.*, the amount of those costs, *on the back of the rule*. On the 18th, execution was executed against the defendant for the debt, 12*l.* for costs, and sheriff's poundage &c., amounting together to 17*l.* 6s. 6*d.* The *fi. fa.* was issued upon presenting to [the proper officer the rule of Court with the prothonotary's allocatur thereon; and the writ recited the rule as its foundation. The damages were not released.

The costs having been taxed and an allocatur signed upon a rule, which gave the plaintiff leave to enter up judgment for debt and costs in an inferior Court to be taxed by the prothonotary, the plaintiff sued out a writ of *fi. fa.* and levied thereunder the debt and costs. The Court ordered it to be set aside, no judgment having been entered up or signed to warrant it.

Butt, for the defendant, on the 27th January, 1836, upon an affidavit that no *judgment* had been entered up or signed, obtained a rule calling upon the plaintiff to shew cause why the writ of execution should not be set aside, and why the sum of 17*l.* 6s. 6*d.* paid thereunder by the defendant should not be refunded to him. He objected that the execution was not issued upon a judgment, none having been entered or even signed, but on the rule of court, so as to avoid the entering of the remittitur, which the court decided that the plaintiff must do before issuing

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execution; and that, at all events, the execution should have issued for the *debt* only.

Stephen, Serjt., shewed cause, upon an affidavit stating that inquiry had without effect been made at the proper office as to the mode of entering up judgment in the matter of a writ of false judgment from a county court, and that no precedent could be found applicable to the case. The taxation of costs is in effect the signing of judgment; and it is not necessary to enter the judgment on the roll before suing out execution; indeed the constant course is otherwise: if, therefore, it were necessary to sign judgment, it has substantially been done in the only way in which it could be done. In *Style's Pr. Reg.* it is said that the signing judgment is but the leave of the court to enter judgment. And there is nothing in the form of this rule to take it out of the general practice, or to make it incumbent on the plaintiff to enter a remittitur of the damages. [*Tindal*, C. J.—The question seems to be whether the plaintiff should not have proceeded by attachment instead of by execution.] The rule pronounced by the court authorizes the issuing of an execution. [*Butt.*—By the statute of Gloucester, 6 Edw. 1, c. 1, the plaintiff is only entitled to costs in cases where he is entitled to damages: therefore the proceeding would be equally objectionable whether by execution or by attachment]. [*Tindal*, C. J.—Should not the costs have been taxed on the proceedings in the court below—on the writ of false judgment?] The proceedings in the court below form no part of the records of this court: the rule of court was the only thing upon which the allocatur could be marked. There is no *postea*, no record of any sort upon which to act: the costs have been taxed, the allocatur signed, and execution issued in strict obedience to the directions of the rule. At all events, the court will not give effect to this application, unless it be shewn wherein consists the irregularity complained of, and how the judgment ought to have been signed.

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TINDAL, C. J.—This cause came before us upon an incidental motion in Michaelmas Term last; and, after hearing the parties, we held that the plaintiff was entitled to judgment and execution for the debt and the costs in the court below—understanding, of course, that such judgment would be signed in the regular way; leaving it to the discretion of the plaintiff to enter a remittitur of the damages or not as he might be advised, it being doubtful whether, there being no award of damages, the plaintiff could have costs. Instead, however, of signing or entering judgment, the plaintiff has proceeded to tax the costs upon the rule of court, and issued execution thereon. It appears to me that the course adopted is irregular whether as a proceeding upon a rule of court or upon a judgment: if a proceeding upon a rule of court, it should have been by attachment; and there has been no regular judgment entered or signed so as to authorize the issuing of a *fi. fa.* The practice upon a writ of false judgment is the same in all respects as upon a writ of error: in the latter, the course is, to attend the clerk of the errors, enter the judgment on the judgment roll, take the rule for judgment and the roll to the master, who thereupon marks the roll and proceeds to the taxation of the costs. In the present case, nothing has been done that is at all analogous to that. The costs have been taxed and execution issued upon a mere rule of court. Our officer informs us that no signature upon such an instrument is ever considered as a signing of judgment. I think this rule must be made absolute.

PARK, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—It was incumbent upon the plaintiff at least to shew to the court that there existed in this case circumstances to dispense with his entering the judgment on the record.

Rule absolute.

COURT OF EXCHEQUER.

Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

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The affidavit
of debt in an ac-
tion by indorsee
against drawer
should allege
the default of
acceptor.

CROSBY v. CLARK.

E. L. WILLIAMS moved for a rule to shew cause why the defendant should not be discharged out of custody on entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail, which was as follows:—"T. R. Crosby, of Water Lane, Tower Street, in the city of London, merchant, maketh oath, and saith, that W. H. Clark is justly and truly indebted to this deponent and to W. Lambe, his co-partner in trade, in the sum of 100*l.*, upon and by virtue of a certain bill of exchange bearing date the 3rd day of October, 1829, drawn by the said W. H. Clark upon, and accepted by one H. Clark for the payment of the sum of 100*l.* to the order of him the said W. H. Clark six years after the date thereof. And this deponent saith, that the said bill of exchange is indorsed by the said W. H. Clark to one J. G., and by the said J. G. indorsed to one J. H. K., and by the said J. H. K. indorsed to this deponent and his said co-partner in trade; and this deponent further saith, that the said bill of exchange was due and unpaid at a certain day now past, and that no part of the said sum of 100*l.* thereby made payable has been paid, but the whole remains due and unpaid from the said W. H. Clark to this deponent and his said co-partner in trade." The

objection was, that the default of the acceptor did not sufficiently appear.

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Dowling shewed cause in the first instance, and submitted that the cases of *Simpson v. Dick* (a), *Buckworth v. Levy* (b), *Cross v. Morgan* (c), and *Banting v. Jadis* (d), must be considered as overruled by *Witham v. Gompertz* (e) and *Irving v. Heaton* (f). The true test of the sufficiency of the affidavit is, that supposing the deponent has sworn falsely, perjury could be assigned. Here the bill is sworn to be due and unpaid; the fact of presentment to the acceptor is necessary to enable the plaintiff to recover on the bill, but it need not be stated in the affidavit. In *Elstone v. Mortlake* (g), an affidavit which stated that the defendant was indebted to the plaintiff on a bill of exchange payable to a third person, at a day now past, was held sufficient, without shewing any connexion between the payee and plaintiff.

LORD ABINGER, C. B.—In an action against the drawer of a bill of exchange, the affidavit should allege a default by acceptor: with respect to notice, the case is different; that is a mixed question of law and fact. It would be difficult for a man to swear that a legal notice has been given, as he would be obliged to swear to all the special circumstances of the notice. The weight of authorities is against this affidavit.

PARKE, B.—I am of the same opinion. The case of *Buckworth v. Levy* was confirmed by *Cross v. Morgan* and *Banting v. Jadis*, which last case was a decision given upon consideration, and after conference of all the judges

(a) Ante, Vol. 3, p. 731.

(b) Ante, Vol. 1, p. 211.

(c) Ante, Vol. 1, p. 122.

(d) Ante, Vol. 1, p. 445.

(e) Ante, Vol. 3, p. 382.

(f) Ante, Vol. 4, p. 638.

(g) 1 Chit. Rep. 648.

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of the King's Bench. *Witham v. Gompertz* is no authority in support of this affidavit: it only decided that it was unnecessary to aver a presentment to the acceptor, or that the drawer had notice of dishonour. The only authority in favour of this affidavit is *Weedon v. Medley* (a); but that case seems to have been decided on the ground that the objection taken was the want of averment of presentment. *Irving v. Heaton* seems to have been decided upon a mistaken idea that *Witham v. Gompertz* was an authority to shew the default of the acceptor unnecessary. It would be difficult upon this affidavit to indict a man for perjury; it being quite consistent with the matter sworn, that the bill was never presented to the acceptor at all.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—*Banting v. Jadis* was a decision not of one judge but of the whole Court. In *Weedon v. Medley*, the defect in the affidavit was not adverted to so particularly as it ought to have been. *Witham v. Gompertz* is no authority in favour of the present affidavit; the ground of that judgment is, that it is not necessary to aver a presentment or notice, but that it is sufficient to show a default. I still adhere to the opinions expressed in the cases of *Cross v. Morgan* and *Buckworth v. Levy*.

Rule absolute.

(a) Ante, Vol. 1, p. 689.

WRIGHT, Assignee of LAINSON and SALOMONS, Esqrs., v.
BARRETT and Another.

The plaintiff
in the action
is not a competent witness to
the assignment
of a bail-bond.

THIS was an action by the assignee of a bail-bond. The declaration was in the usual form, and the statement of the assignment alleged that the sheriff, at the request

and cost of the plaintiff, by an indorsement on the said writing obligatory, duly made in the presence of and *attested by two credible witnesses*, and sealed with his seal of office, assigned the said writing obligatory to the plaintiff, according to the form of the statute in such case made and provided. The defendant, by his plea, traversed that the sheriff assigned the said writing obligatory according to the form of the statute in such case made and provided. At the trial of the cause it appeared that the plaintiff himself was one of the witnesses to the assignment.

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 WRIGHT
 v.
 BARRETT.

Platt having last Hilary Term obtained a rule to set aside the verdict and enter a nonsuit, on the ground that this was not an assignment by two credible witnesses within the meaning of the statute—

Busby shewed cause.—The 4 Anne, c. 16, s. 20, directs the sheriff to assign the bond by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses. If, therefore, the sheriff put his seal of office to the assignment, it is not necessary that it should be attested by the witnesses, but only that two persons should be present to witness what he has done. The decisions on the 5th section of the Statute of Frauds are not applicable to the present case. There, the words are, that all devises shall be in writing, and shall be attested and subscribed, in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect. The different language of these statutes shews that there must have been a different intent in framing them. From the case of *Anstey v. Dowsing* (a), it appears that the condition of the witness at the time of the attestation was the only thing to be regarded. In *Wyndham v. Chetwynd* (b) the subscribing witnesses were credi-

(a) *Strange*, 1253.(b) *Burr.* 414.

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tors of the devisor, but their debts having been paid before his examination, the Court were of opinion that these witnesses were credible within the meaning of the statute.

LORD ABINGER, C. B.—It seems to me very evident that this assignment is not properly attested.

PARKE, B.—It is clear, that, where the statute mentions two credible witnesses, they must be two indifferent persons.

The rest of the Court concurred.

Rule absolute.

BRIANT v. CLUTTON.

The plaintiff being in the custody of the Marshal of the King's Bench, was charged in execution on an attachment which the defendant had caused to be issued out of this Court:—*Held*, by *Parke, Bolland, Alderson, Bs.*, (Lord *Abinger*, C. B., dissentiente), that there was *prima facie* an act of trespass, for which an action was maintainable, and that if the defendant were justified under the writ, he should plead that matter specially.

THIS was an action of trespass for false imprisonment. The defendant pleaded not guilty only. At the trial of the cause before Lord *Abinger*, C. B., at the sittings after last term, it appeared that whilst the plaintiff was in the custody of the Marshal of the King's Bench the defendant had caused him to be charged in execution on an attachment issuing out of this Court. The learned Judge thought, that as the wrong complained of was committed under process of the Court, trespass was not maintainable, and he nonsuited the plaintiff. A rule nisi for setting aside the nonsuit and for a new trial having been obtained by *Bompas*, Serjt., in last Hilary Term,

Platt shewed cause, and contended that trespass would not lie in any case where a party was imprisoned under process of a Court having competent authority, though he might have been wrongfully taken.

PARKE, B.—I am of opinion that in this case there ought to be a new trial. The imprisonment complained

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of was the consequence of the act of the defendant. The plaintiff, being in the custody of the Marshal, was brought from the prison of the King's Bench into this Court, to be charged in execution on an attachment which the defendant had caused to be issued against him. Here, then, *primâ facie*, a trespass was committed; for the plaintiff might then have been entitled to his discharge from the cause for which he was first imprisoned. The question then is, supposing the defendant was entitled to detain him by reason of the attachment, can that justification be given in evidence under the general issue. I am of opinion that it cannot, and that it ought to be specially pleaded; and it makes no difference whether the imprisonment is under civil or criminal process; and unless it be pleaded, there is no way by which the validity of the process, assuming it might be invalid, can be brought before the Court.

BOLLAND, B.—I am also of opinion that this rule should be absolute for a new trial. The defendant appears to have caused the imprisonment; and the question is, whether he was justified in so doing: he should therefore shew his authority by pleading the process under which he acted.

ALDERSON, B.—On the part of the plaintiff, I think it was sufficient to shew that he was imprisoned by the act of the defendant—that he was detained in custody by something which the defendant did. Probably the defendant was justified; but, in order that that may appear, he ought to plead the matter specially.

LORD ABINGER, C. B.—I still retain the same opinion as at the trial. I do not deny the imprisonment stated, as the act of trespass was done by the defendant, but it appears to me the detainer in this case was not an act of

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trespass. From the evidence it was shewn that there was a direct order of the Court for his imprisonment, under an attachment, before he was discharged from the previous cause. His being brought into Court to be charged in execution on that attachment was not, in my opinion, a new custody. And, as it seems to me, the detention is the act of the Court itself.

Rule absolute for a new trial.

PARTRIDGE v. SALTER.

It is a sufficient answer to a motion for judgment as in case of a nonsuit, that the defendant has taken proceedings against the plaintiff in the Court of Chancery, and thereby rendered it needless to proceed to trial.

MANNING shewed cause against a rule obtained by *Greenwood* for judgment as in case of a nonsuit, for not proceeding to trial. His affidavit disclosed, that, after the commencement of the action, the defendant had filed a bill in the Court of Chancery against the plaintiff, and an injunction had thereupon issued to restrain him from proceeding at law. In January, 1835, an amended bill was filed, when the injunction was dissolved, and in March, 1835, an answer was put in to this bill. Issue was joined in the present cause in last Trinity Term, and afterwards the defendant replied to the plaintiff's answer to the amended bill, and served him with a subpoena to rejoin. The affidavit further stated, that the cause in Chancery was now at issue, and if an account were taken there, it would be unnecessary to proceed to trial in the action at law.

Greenwood submitted that proceedings in the Court of Chancery would not be taken notice of in a Court of law.

Lord ABINGER, C. B.—Where the plaintiff furnishes a reasonable excuse for not proceeding to trial, we shall not give judgment as in case of a nonsuit.

PARKE, B., concurred.

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ALDERSON, B.—You have no right to make a motion for judgment as in case of a nonsuit, when, by your own proceedings, you have rendered it improper and needless to proceed at law.

Rule discharged.

GUTSOLE v. MATHERS.

CASE.—The declaration stated that the plaintiff was lawfully possessed of divers large quantities, to wit, 40,000 tulips, then being the property of the plaintiff, and being of great value, to wit, of the value of 10,000*l.*; and he, the plaintiff, was then desirous of selling and disposing of the same by public auction; and for that purpose had issued hand-bills announcing that they would be exposed to sale by public auction, at No. 58, St. George's Street, Canterbury, on Wednesday, the 20th day of May, 1835. Yet the defendant well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff, and to cause it to be suspected and believed that the said tulips had been and were stolen from one John Mathers, the brother of the defendant, and to hinder and prevent the plaintiff from selling and disposing of the same, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the said exposure to sale of his said tulips, and to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, heretofore and before the exposure to sale of the said tulips, as hereinafter mentioned, to wit, on the 15th day of May, in the year of our Lord 1835, wrongfully, injuriously, falsely, and maliciously *asserted and represented, in the presence and hearing of divers good and worthy subjects of this realm, that the said tulips were stolen property; and*

The declaration alleged that the plaintiff being about to sell some tulips, the defendant *falsely represented that the said tulips were stolen property, and also that the said tulips were the property of defendant's brother, and that whoever bought the said tulips would buy stolen property, by reason whereof the plaintiff was unable to sell the said tulips:—Held,* on motion in arrest of judgment, that the words should have been set out.

In all actions of slander it is necessary to set out the words in the declaration, whether they be actionable in themselves, or only so by reason of special damage.

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whereas also the defendant, further contriving and intending as aforesaid, afterwards and before the exposure to sale of the said tulips, to wit, on the 20th day of May, in the year aforesaid, wrongfully, injuriously, falsely, and maliciously asserted and represented, in the presence and hearing of H. P., T. Y., and W. Y., and divers others, good and worthy subjects of this realm, of and concerning the said tulips of the plaintiff so then about to be exposed to sale by public auction as aforesaid, *that the said tulips were the property of the defendant's brother, and that whoever bought the said tulips would buy stolen property,* (thereby then and there meaning that the said tulips were the property of the said John Mathers, the brother of the defendant, and had been stolen from the said John Mathers). And the plaintiff further saith, that afterwards, to wit, on the said 20th day of May, in the year aforesaid, the said tulips of the plaintiff were put up and exposed to sale by public auction at No. 58, St. George's Street, Canterbury, aforesaid, in the presence of divers and very many of the liege subjects of our said lord the King, in order that the same might be then and there sold for the benefit of the said plaintiff; but by means of the committing of the said several grievances by the defendant as aforesaid, divers of the said liege subjects of our said lord the King who were present at and upon the said exposure to sale as aforesaid, and who were then about to be and become purchasers of great part of the said tulips of the plaintiff, and who might and would otherwise have bid for and purchased the same, and particularly the said H. P., T. Y., and W. Y., who were then respectively about to bid for and would otherwise have purchased a great part of the said tulips, were thereby then wholly deterred and prevented from bidding for and becoming the purchasers of the said tulips or any part thereof, and then and from thence hitherto have wholly declined to purchase the same or any part thereof; whereby the plaintiff was then hin

dered and prevented from selling and disposing of his said tulips, and hath thereby not only lost and been deprived of all the advantages and emoluments which he might have derived and acquired from the sale thereof; but also thereby divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of 20*l*., which he the plaintiff was forced and obliged to and necessarily did pay, lay out, and expend in and about the said exposure to sale, and expenses incidental thereto, became and were wholly useless and unproductive, and entirely lost to the plaintiff.

A verdict having been found for the plaintiff with 50*l*. damages, *E. Perry*, in last Hilary Term, obtained a rule for arresting the judgment, on the ground that the words ought to have been set forth in the declaration.

Andrews, Serjt., and *George*, shewed cause.—The general rule which requires the words to be set out in the declaration only applies to cases which are, strictly speaking, actions of slander. In the present case the *gist* of the action is the damage arising from the loss of the sale of the tulips, and it is immaterial by what words that damage was caused. In slander of title, it is not necessary to state the exact words; and the declaration in *Smith v. Spooner* (a) is precisely the same as the present. If the words must be set out here, it would be equally requisite in all actions for deceit and false representation. In the case of a master giving a false character of a servant, it is not usual to set out the identical words. Properly speaking, this is an action on the case, and not an action of slander. The truth might have been given in evidence under the general issue; *Smith v. Spooner* (a), *Watson v. Reynolds* (b), *Hargrave v. Le Breton* (c); which could not

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(a) 3 Taunt. 246.

(b) M. & M. 1.

(c) 4 Burr. 2422.

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be done if the action were slander. Neither is the present case within the operation of the 21 Jac. 1, c. 66, s. 6, which prevents the plaintiff from recovering, in actions of slander, more costs than damages if the damages are under 40s. (a). Nor is it within the third section of the 21 Jac. 1, c. 16, which limits the time for bringing actions upon the case for words to two years. *Law v. Harwood* (b), *Carter v. Fish* (c). But, at all events, the declaration is good after verdict. In *Blizard v. Kelly* (d), the count charged that the defendant had wrongfully and without reasonable or probable cause imputed the crime of felony to the plaintiff, and it was held sufficient after verdict.

Platt, and *E. Perry*, in support of the rule.—This is an action for slander, and the words should have been placed upon the record, that the Court may see and judge of them: *Cook v. Cox* (e). It is precisely the same whether the words are actionable of themselves, or only in respect of special damage. In slander of title they should be set out; for if they amount to a claim of title in the defendant himself, no action will lie: *Gerard v. Dickinson* (f), *Gresham v. Guntley* (g). It is for the Court to say whether the words admit of the interpretation put upon them: *Crush v. Crush* (h). If the words had been set out, it is possible the action could not have been maintained: *Bold v. Bacon* (i). Besides, by this form of declaration, the plaintiff might deprive the defendant of the benefit of the 21 Jac. 1, c. 16, for if the words had been set out, and appeared actionable of themselves, the case would have been within the operation of that statute.

Cur. adv. vult.

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| (a) Tidd's Prac. 962. | (e) 3 M. & S. 111. |
| (b) Cro. Car. 141. | (f) 4 Co. 18 a. |
| (c) 1 Stra. 645. | (g) Yelverton, 89. |
| (d) 3 D. & R. 519; 2 B. & C. | (h) Ibid. 80. |
| 283. | (i) Cro. Eliz. 346. |

Lord ABINGER, C. B., now delivered the judgment of the Court.—In this case the first count of the declaration alleged that the plaintiff being about to sell some tulips, the defendant falsely represented that the tulips were stolen; and the count stated that the defendant falsely asserted the tulips belonged to another person, and were not the property of the plaintiff. After verdict for the plaintiff, an objection was taken that the words spoken should have been set out in the declaration, that the Court might see whether the charge against the defendant was one which he was bound to answer. The plaintiff replies that the general rule requiring the words spoken to be set out is applicable to those cases only in which the action is, properly speaking, an action of slander,—in which the slanderous matter is spoken concerning the character, profession, or office of the plaintiff; and in which the words would be of themselves actionable without any averment of special damage; but that it does not apply to those cases in which the special damage is the *gist* of the action. Upon looking into the cases, we cannot find any authority in support of this distinction. In *Nelson v. Dixie* (a), it is indeed said that it is sufficient to set out the substance of the words; but, as observed by Lord *Ellenborough*, C. J., in *Cook v. Cox* (b), the words used by Lord *Hardwicke* were merely thrown out at *Nisi Prius*, and not material to the point ruled by him in that cause; and they are evidently founded upon a mistake, for in *Rastall's Entries* there is not any precedent in which the words are not set out. The judgment in *Cook v. Cox* was given after consideration, and upon such distinction being taken as in the present case. That decision is a sufficient authority in support of this motion; and it appears to us there is no difference in principle between that class of cases in which the words are actionable in themselves, or only

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(a) Cas. temp. Hardw. 305.

(b) 3 M. & S. 110.

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actionable by reason of special damage. If it were sufficient to state the substance of the words only, witnesses would be called to speak to the effect of words, and juries would have to decide upon the effect of words; whereas their effect must be decided by the Court. The speaking of the words and their effect are distinct matters, and it is not expedient to blend questions of law and fact. It ought to appear to the Court upon the face of the declaration, either by words or signs, or *innuendoes*, that the matter stated to be slanderous bears the fair interpretation put upon it. We think it proper, for these reasons, to adhere to the general practice, and to arrest the judgment. There may be a class of cases to which this rule will not apply; for instance, actions for deceit, or actions founded upon a deceitful intention to injure the property of another, and to induce him to advance his money upon a false representation; though such cases are not, properly speaking, actions for words. Another class of cases is when a person injures another by a claim of goods which do not belong to him, and so prevents the owner from having the benefit of their sale. For the above reasons, we think the words should have been set forth in the declaration, notwithstanding the damage resulting from the plaintiff's statement is the *gist* of the action. The rule must therefore be made absolute for arresting the judgment.

Rule absolute.

JENKINSON v. NORTON.

A debt reduced below 40s. by a set-off is not within the Middlesex County Court Act.

DEBT for goods sold and delivered. Pleas—Nunquam indebitatus, and a set-off. The plaintiff by his particulars claimed 17*l.* for clothes supplied to the defendant. The cause was tried before the under-sheriff of Middlesex, when the plaintiff's claim was reduced by the set-off to

15s. 9d., for which amount the jury found a verdict. *C. Jones* having obtained a rule for entering a suggestion under the 23 Geo. 2, c. 33, s. 19 (the Middlesex County Court Act), to give the defendant double costs, the plaintiff having recovered less than 40s., and the defendant residing within the county of Middlesex—

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Humfrey shewed cause.—In *Tidd's Practice* (a) it is stated to be a constant and invariable rule that none of the Court of Conscience Acts extend to cases where the debt, being originally above the limited amount, is reduced by set-off or tender. The reason is expressed in the case of *Pitt v. Carpenter* (b). There the Court observed, "How could the plaintiff tell whether the defendant could set off any thing in that action, so as to be bound to choose their jurisdiction? Besides, he has in effect recovered the larger amount, because a debt which he must otherwise have paid is now satisfied. There are two causes determined, both of them of greater value than is within the inferior jurisdiction." In *Jones v. Harris* (c), *Taunton, J.*, says, there are very good reasons why a case in which the plaintiff's demand is reduced by a set-off should be exempted from the operation of the statute, and he refers to *Pitt v. Carpenter*. Besides, it is clear, from the language of the 1st and 19th sections of the statute, that it is confined to cases where the person who brings the action has at the time he brings it no debt or damage due to him of a greater amount than 40s. The first section enacts, that it shall be lawful for the suitors of the Court, together with the county clerk of the said county court, upon any plaint to be entered in the said court in any suit where the debt or damage shall not amount to the sum of 40s., to proceed in a summary way, &c.; and the 19th section enacts, that in case any action shall be commenced in the Courts at

(a) P. 959.

(b) 2 Strange, 1191.

(c) Ante, Vol. 1, 376.

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actionable by reason of special damage. If it were sufficient to state the substance of the words only, witnesses would be called to speak to the effect of words, and juries would have to decide upon the effect of words; whereas their effect must be decided by the Court. The speaking of the words and their effect are distinct matters, and it is not expedient to blend questions of law and fact. It ought to appear to the Court upon the face of the declaration, either by words or signs, or *innuendoes*, that the matter stated to be slanderous bears the fair interpretation put upon it. We think it proper, for these reasons, to adhere to the general practice, and to arrest the judgment. There may be a class of cases to which this rule will not apply; for instance, actions for deceit, or actions founded upon a deceitful intention to injure the property of another, and to induce him to advance his money upon a false representation; though such cases are not, properly speaking, actions for words. Another class of cases is when a person injures another by a claim of goods which do not belong to him, and so prevents the owner from having the benefit of their sale. For the above reasons, we think the words should have been set forth in the declaration, notwithstanding the damage resulting from the plaintiff's statement is the *gist* of the action. The rule must therefore be made absolute for arresting the judgment.

Rule absolute.



JENKINSON v. NORTON.

A debt reduced below 40s. by a set-off is not within the Middlesex County Court Act.

DEBT for goods sold and delivered. Pleas—Nunquam indebitatus, and a set-off. The plaintiff by his particulars claimed 17*l.* for clothes supplied to the defendant. The cause was tried before the under-sheriff of Middlesex, when the plaintiff's claim was reduced by the set-off to

PARKE, B.—I am also of opinion that the statute extends to cases of a debt reduced by payment or satisfaction, and not to the case of set-offs. It was suggested, that there was a difference in this particular act, which took it out of the general rule; but upon comparing the first and nineteenth sections, it is evident the statute does not apply to a debt reduced by set-off. By the terms of the first section, the plaintiff never could have sued for this debt in the county court; and common sense must confine the operation of the nineteenth section to cases in which the plaintiff could prosecute his suit in the county court.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—Before a party is prejudiced in respect of bringing an action in the superior Court, we ought to be satisfied that it was competent for him to have sued in the inferior; otherwise you punish him for not doing that which he could not do under the act of Parliament.

Rule discharged, with costs.

MILLS v. BARBER.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. Plea—That the defendant accepted the bill for the accommodation of the drawer, and without any consideration or value for his acceptance; and the drawer indorsed it to the plaintiff without any consideration or value; and the plaintiff, at the time of the commencement of the suit, was the holder of the same without any consideration or value. Replication—That the plaintiff was the holder for consideration and value. At the trial before Alderson, B., at the sittings in last Hilary Term, the plaintiff having produced the bill with the defendant's signature,

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The circumstance of a bill having been given for accommodation, is not sufficient to cast upon the holder the onus of proving consideration, but the defendant must first make out a case of fraud or suspicion.

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was about to rest his case there. The defendant's counsel contended, that upon these pleadings it was incumbent on the plaintiff to prove that he gave value for the bill. On the part of the plaintiff it was contended, that the bill was *prima facie* evidence of consideration, and that he was not bound to prove actual consideration, unless his title was first impeached by evidence on the part of the defendant. Both parties having refused to produce evidence, the learned Judge directed a verdict to be entered for the plaintiff for the amount of the bill.

Humfrey having, in last Hilary Term, obtained a rule nisi for a new trial,

Theobald shewed cause, and contended that the mere circumstance of its being an accommodation bill, was not sufficient to throw the onus probandi on the plaintiff, unless there appeared some fraud or mala fides connected with it. He referred to *Fentum v. Pocock* (a), *Thomas v. Newton* (b), and *Percival v. Frampton* (c).

Humfrey, in support of the rule, relied on *Heath v. Sanson* (d), and *Simpson v. Clarke* (e), and contended that in all cases where there is a defect of consideration between the original parties, the holder must prove value.

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the Court.—This was an action on a bill of exchange by indorsee against acceptor: the defendant pleaded that the bill was given for the accommodation of the drawer and indorsed to the plaintiff without consideration. The

(a) 5 Taunt. 192; 1 Marsh. 14. M. & R. 180.

(b) 6 C. & P. 606.

(d) 2 B. & Adol. 291.

(c) Ante, Vol. 3, p. 748; 1 C.

(e) 2 C. M. & R. 342.

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question was, whether the plaintiff gave consideration. At the trial of the cause both parties were unwilling to act: the plaintiff stood upon his right, that the production of the bill under such circumstances was *primâ facie* evidence of consideration; the defendant contended that the proof of the issue was cast upon the plaintiff, because the affirmative was with him. Neither party having produced evidence, the Judge directed a verdict to be entered for the plaintiff. The question is more one of practice than of law; for nobody doubts that, under these circumstances, unless the plaintiff has given consideration, he cannot recover. The only question, therefore, is, from whom the proof is to come. The cases cited by the defendant's counsel shews what the practice has been, viz. that where it is an accommodation bill the plaintiff has the *onus probandi* cast upon him. But it should be observed, that it was formerly usual for the defendant to give notice to the plaintiff to prove the consideration; and it was the general practice, where the plaintiff received such notice, to act in the first instance, and to prove that he gave value. The Judges have taken into consideration the judgment of the Court of King's Bench in the case of *Heath v. Simpson*, and upon deliberation have been induced to withdraw their opinion. In *Simpson v. Clarke*, I state it was not my intention in deciding that case to decide the same point as the present. I think there is a distinction between accommodation bills and bills obtained by fraud. Where a bill is given for accommodation there is a presumption that money has been paid upon it, for that is the object of the bill. Where a man does not come into Court under a suspicion of fraud, he must be presumed in the first instance to be a *bonâ fide* holder; for the proof that the bill was given for accommodation is not a proof that money has not been raised upon it. If the acceptor lend his name to the drawer, the probability is that the drawer has received money upon the bill;

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on the other hand, if the drawer has lent his name, it is most likely the acceptor has received value for it. Unless therefore the case is connected with a species of fraud, or there are circumstances from which a fair suspicion of fraud arises, either that the bill was lost or stolen, and that the holder does not hold it honestly, if such state of facts appear, then the onus probandi ought to be cast upon the plaintiff to shew that he gave consideration for it. The principle therefore is, that where no fraud or suspicion arises, the plaintiff is not bound to shew he gave value, but he must if fraud appears. Upon these grounds the Court has come to the conclusion, corroborated by the opinions of the other Judges, that in the present case the onus probandi lay upon the defendant. But as the cases cited are in favour of the defendant, the rule may be absolute for a new trial.

Rule absolute for anew trial.

The cases of *Till v. Rawling* and *Bounsall v. Harrison*, being under circumstances precisely similar, were determined by the above decision.

SNELLING v. CHENNELLS.

In order to obtain particulars in trespass, trover, or on the case, there must be an affidavit, stating that defendant does not know what the plaintiff is going for.

IN an action of trespass for a disturbance of the plaintiff's right of common, *Channell* moved for particulars of the locus in which the trespasses were alleged to have been committed. The affidavit on which he moved, stated that several actions had been brought by the same plaintiff against different defendants; and it was material to know, whether the plaintiff proceeded in respect of the same alleged right in all.

PARKE, B.—Your affidavit ought to state that you do

not know what the plaintiff is going for. Such an affidavit is necessary, in order to obtain particulars in every action of trespass, trover, or on the case.

Rule refused.

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CHAFFERS v. GLOVER.

ARCHBOLD moved to make absolute a rule nisi for referring it to the Master to compute principal and interest on a promissory note. The defendant was a student in the University of Cambridge; and the affidavit stated, that deponent had gone to defendant's apartments, and found the door open, but the defendant was not there, nor was there any person in the rooms. The deponent left a copy of the rule, and went to the porter of the college, who informed deponent that the defendant was at that time residing there.

Service of a rule nisi to compute, by leaving it at defendant's apartments, in which no person then was, though the defendant then resided there, is not sufficient.

PER CURIAM.—That is not sufficient.

Rule refused (a).

(a) See *Gardner v. Green*, ante, Vol. 3, p. 343.

Ex parte JAMES PARRY.

ARCHBOLD moved to re-admit Mr. Parry as an attorney of this Court. In the year 1830 he had been admitted an attorney of the Court of King's Bench, and in 1831 he was admitted in this Court. He continued to practise for some time, but subsequently ceased to take out a certificate. He had lately made an application to the Court of King's Bench for re-admission, and that

Where an attorney, having ceased to practise, has been re-admitted in the K. B., he may be re-admitted in this Court, upon reading the rule for his re-admission in the K. B., without

putting up a notice, or making the usual affidavit.

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Court had permitted him to be re-admitted, without the payment of any fine. The question was, whether he ought to put up the notice, and make the usual affidavit in this Court. In *Ex parte Yeates* (a), an attorney who had been struck off the roll of the Court of King's Bench, was struck off the roll of the Court of Common Pleas, on reading the rule for striking him off the roll of the King's Bench; his innocence of the alleged misconduct being afterwards proved to the satisfaction of the Court of K. B., the Court of Common Pleas re-admitted him without the payment of any arrears of duty or fine.

PER CURIAM.—Let the rule be absolute for his re-admission.

Rule absolute.

(a) Ante, Vol. 1, p. 724; S. C. 2 Moore & S. 618.

RICHARDSON and Wife v. ROBERTSON.

Quære, if payment, *after* action brought, can be given in evidence in mitigation of damages, under non assumpsit.

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea—non assumpsit. The plaintiff, by his particulars, claimed 100*l*. At the trial it appeared, that, *after* the action was brought, 50*l*. had been paid by the defendant to the plaintiff's wife. This evidence was objected to, on the ground that it ought to have been specially pleaded; and ultimately a verdict was found for the plaintiff for 50*l*.

Steer having, on a former day, obtained a rule nisi to reduce the damages to 50*l*.,

Hoggins shewed cause, and relied on Reg. Gen. H. T. 4 Will. 4, which requires, in every species of assumpsit, all matters in confession and avoidance to be pleaded

specially. The 17th rule also gives the form of plea where the money is paid after action brought.

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The case of *Shirley v. Jacobs* (a) was referred to; but the defendant's counsel having admitted the payment of the 50*l*, the Court made the rule absolute, but at the same time wished it to be understood that they gave no opinion on the point.

Rule absolute.

(a) Ante, Vol. 3, p. 101; 2 Scott, 157, S. C.

— See *Shirley v. Jacobs* 21 L.J. 210.

DANIELS v. MAY.

STEER having, on a former day, obtained a rule nisi for setting aside an interlocutory judgment for irregularity—

"A. B., clerk to C. D., defendant's attorney," is not a sufficient description of a deponent.

Barstow shewed cause, and took a preliminary objection, that the deponent's place of abode was not stated in the affidavit upon which the rule was obtained, pursuant to the direction of 1 Reg. Gen. H. T. 2 Will. 4, s. 5 (a). The commencement of the affidavit was in the following form:—"A. B., clerk to C., D., the defendant's attorney, maketh oath and saith, &c."

Steer, in support of the rule, contended that the object of 1 Reg. Gen. H. T. 4 Will. 4, s. 5, was merely to give the opposite party the means of knowing where to find a deponent, and that object was sufficiently attained by the description of "clerk to defendant's attorney."

Lord ABINGER, C. B.—We must adhere with strictness to general rules. The affidavit is insufficient.

Rule discharged.

(a) Ante, Vol. 1, p. 184.

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An informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try; the objection can only be taken advantage of on special demurrer.

SMITH v. SMITH.

IN debt for goods sold and delivered, and on an account stated, the defendant pleaded as to the sum of 10*l.*, parcel of the monies in the declaration mentioned, that, after the said sum of 10*l.*, parcel &c., accrued due to the plaintiff, and before the commencement of the suit, the defendant paid to the plaintiff the sum of 10*l.*, in full satisfaction and discharge of the said sum of 10*l.*, parcel &c., and which said sum of 10*l.* the plaintiff then accepted and received of and from the defendant, in full satisfaction and discharge of the said sum of 10*l.* parcel &c., and of all damages occasioned by the detention thereof; *and of this the defendant puts himself upon the country.* And as to the residue of the declaration, that he never was indebted. The plaintiff added the similiter to both pleas. At the trial before the sheriff of Middlesex, the defendant objected, that there was no issue joined on the first plea, inasmuch as it concluded to the country, instead of with a verification. The sheriff overruled the objection, and tried the cause, and a verdict was found for the plaintiff.

Mansel now moved for a rule for arresting the judgment, or for a repleader. In support of the motion he cited *Wordsworth v. Brown* (a).

PER CURIAM.—This case is different from *Wordsworth v. Brown*; here there is clearly an issue, and if the plaintiff wished to take advantage of the informal conclusion of the plea, he should have demurred specially.

Rule refused.

(a) Ante, Vol. 3, p. 698.

1836.

NORTON'S Bail.

J. JERVIS opposed the bail, and took a preliminary objection that the notice of justification omitted to state whether the bail would justify in person, or by affidavit.

If bail appear in Court to justify, it is no objection that the notice of justification omitted to state whether they would justify in person, or by affidavit.

PER CURIAM.—The bail are present here, and that is sufficient.

The bail afterwards justified.

DOE *d.* READ and Another *v.* ROE.

WIGHTMAN moved for judgment against the casual ejector. The affidavit stated, that the declaration was served on a female servant on the premises, who informed the deponent that she had been left in care of them by the tenant in possession; but it did not appear that the tenant had received any notice of the service.

Service of a declaration in ejectment on a servant in care of the premises, is insufficient to obtain a rule in the first instance; and in order to obtain a rule nisi, some probable ground must be shewn for believing that the tenant has notice of the service.

LORD ABINGER, C. B.—Have you any case in which the service on a servant has been held sufficient?

Wightman then applied for a rule nisi, and submitted that such was the ordinary practice in cases of this description.

PER CURIAM.—Without your affidavit shews some belief that the tenant had notice of the service, we cannot grant the rule, for he may be in this predicament: he may say there is no affidavit to answer. You must first make out some probable ground for believing that the tenant has received the declaration.

Rule refused.

1836.

STRONG v. DICKINSON.

Where an attorney defendant claims a privilege from arrest *eundo*, it must clearly appear that he left home for the purpose of attending the Court.

LUDLOW, Serjt., moved for a rule to shew cause why a writ of habeas should not issue for the purpose of bringing up the defendant to be discharged out of custody. The affidavit upon which he moved, stated that the defendant was an attorney of this Court; that a certain cause in which he was engaged as attorney was that day in the list; that he was on his way to Westminster Hall, in order to be present at the hearing of that cause; and having gone into a coffee-house for a few minutes to consult a friend, he was arrested there on a *ca. sa.* at the suit of the plaintiff.

Platt shewed cause upon an affidavit of the sheriff's officer, which stated that deponent arrested the defendant at the Auction-mart Coffee-house, between two and three o'clock in the afternoon; that defendant did not tell deponent he was going to attend any of the Courts of law, but said he came into the coffee-house to see a person with whom he was about to make an arrangement respecting the getting some money to pay that debt.

Ludlow, Serjt., and *F. V. Lee*, in reply.—The privilege claimed is the privilege of the client, and the attorney is entitled to it *eundo*, *morando*, *et redeundo*, unless the deviation or delay is unreasonable. In *Luntley v. Nathaniel* (a) the defendant, a practising barrister, was returning from the sessions, and, having gone into a picture shop, was arrested there; the Court held him clearly entitled to be discharged. [*Parke*, B.—Is it sworn that the defendant left home with the sole intention of attending the Court?] The affidavit does not state where the defendant came

(a) Ante, Vol. 2, p. 51.

from, but it shews it was necessary for him to attend the Court, as his cause was in the list. There is no distinction between a party attending a Court, or returning. In *Lightfoot v. Cameron* (a), the defendant's cause was put off early in the day, yet he stayed in Court till five in the afternoon, to speak with his attorney, who was engaged in other causes, and then at the rising of the Court went with his attorney and witnesses to dine at a tavern, and during dinner was arrested; but this was not considered a deviation. [*Purke*, B.—You will find in all those cases that the liberty was for the purpose of enabling the party to return home.] In *Pitt v. Coomes* (b), the plaintiff called at the office where he kept his papers, but did not reside, to refresh himself; he remained there nearly two hours, and then went into a tailor's shop in the same street, where he was arrested; and it was held that the privilege of the party *redeundo* had not ceased when he was arrested.

LORD ABINGER, C. B.—An attorney is undoubtedly entitled to a privilege from arrest, *eundo*, *morando*, et *redeundo*; and if it be clearly shewn that he was attending any of the Courts, it is not expected that he should go at full speed, or return by the shortest road home. But in all the cases which have been cited, there does not appear to have been any distinct deviation wholly unconnected with his progress, at the time of the arrest. It behoves the party applying for this privilege distinctly to shew the circumstances under which he claims it; and the affidavit should specially state that he was proceeding from home to the Court. It is perfectly consistent with the affidavit in the present case that he might have set out for some purpose wholly unconnected with his business in Court. If this affidavit were a precedent for allowing an attorney to be privileged, he might go where

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—
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v.
Dickinson.

(a) 2 H. Blac. 1113. (b) 3 Nev. & M. 212; 5 B. & Adol. 1079.

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he pleased during the day, so that he came in the afternoon to Westminster Hall. Upon his own statement he went to a coffee-house for a different purpose than the business of his client, and then he comes late in the day to Westminster Hall for the purpose of calling upon us to allow his privilege. There is no case where the affidavit upon which the privilege was obtained has been liable to the same objections. If the affidavit had stated that he lived in the city, and went into a coffee-house to refresh himself on his way to Westminster Hall, the case might have been different; but the present affidavit is clearly insufficient.

PARKE, B.—I am of the same opinion, and I found my opinion entirely on the defect of the plaintiff's affidavit. It is not sworn that he left his house in the morning for the purpose of attending the Court, nor does it state where his house was, or that he went on the business of his client. Consistently with this affidavit he may have gone into the city for the purpose of transacting the business of his various other clients. We should be carrying the privilege much further than before, by allowing the discharge upon an affidavit like this.

BOLLAND, B.—I am of the same opinion. In the case of *Lightfoot v. Cameron, De Grey*, C. J., says, "such a necessary refreshment as this is not to be looked upon as a deviation, so as to cancel the defendant's privilege *re-deundo*." But in the present case it appears that the defendant went into the coffee-house, not to refresh himself, but for the purpose of trying to raise some money.

ALDERSON, B.—The defendant introduces the statement respecting Westminster Hall in a very lax manner, and it appears clearly from his own affidavit that he has deviated.

Rule discharged.

1836.

GOODCHILD v. PLEDGE.

DEBT.—The declaration alleged that the defendant was indebted to the plaintiff in 20*l.* for goods sold and delivered, and in 20*l.* for board and lodging, and in 20*l.* for money due on an account stated, which said several monies were to be paid respectively by the defendant to the plaintiff on request: whereby, and by reason of the non-payment thereof, an action hath accrued to the plaintiff, to demand and have of and from the defendant the said several monies, respectively amounting to the sum of 60*l.* above demanded; yet the defendant hath not paid the said sum above demanded, or any part thereof.” The defendant pleaded to the whole declaration *nunquam indebitatus*: “and for a further plea to the first count, that, before the commencement of the suit, and when the said sum of 20*l.* in that count mentioned became due and payable, to wit, on the 1st day of January, 1831, he paid to the plaintiff the said sum of 20*l.*, according to the defendant’s said contract and liability in the said first count mentioned; and of this the defendant puts himself upon the country.” Special demurrer to the second plea, assigning for causes that the said second plea does not, as it ought to have done, although containing new matter, to wit, payment, conclude with a verification, but that it improperly concludes to the country.

Payment should be pleaded in confession and avoidance, and must conclude with a verification.

Mansel, in support of the demurrer, referred to *Ansell v. Smith* (a), and contended that a plea of payment, since the new rules, must conclude with a verification. If the plea shews a payment at the time the debt accrued, it is simply a denial of the liability stated in the declaration, and is therefore bad as amounting to the general issue.

(a) Ante, Vol. 3, p. 193; S. C. 1 C. M. & R. 522.

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Ogle, in support of the plea.—The plea avers the payment of the money according to the defendant's contract and liability. That is a traverse of the matter stated in the declaration, and it is a general rule that where the plea traverses the breach without inserting new matter, it must conclude to the country. There is a distinction between a plea of payment which denies the breach, and a plea which confesses and avoids it.

PER CURIAM.—The breach stated in the declaration is mere matter of form. If the defendant seeks to discharge himself from the debt, that must be pleaded in confession and avoidance. The new general issue of *nunquam indubitatus* was framed for the special purpose of causing all these matters to be pleaded by way of confession and avoidance. As the point is new, the defendant may amend on payment of costs.

Leave to amend on payment of costs.

JONES v. NANNY.

In assumpsit for work and labour, a defence that the work was to be done without reward, may be given in evidence under the general issue.

Semble.—In all cases in assumpsit, or debt on simple contract, where the defence shews a liability different from the implied promise or liability alleged in the declaration, the general issue is the proper plea.

THIS was an action of assumpsit for work and labour as an attorney and solicitor, and for money paid, and on an account stated. To the first count the defendant pleaded to a certain sum, parcel of the money therein mentioned, a special agreement that the work was to be done without fee or reward. To this plea the plaintiff demurred specially, and assigned for cause, that the plea amounted to the general issue.

Cowling, in support of the demurrer, was stopped by the Court.

J. Jervis, in support of the plea, admitted that *Cousins*

the proper plea.

v. Paddon (a) was against him, but referred to *Edmonds v. Harris* (b), in which it was held, that, since the new rules of pleading, a defence that the goods were sold on a credit not yet expired, could not be given in evidence under the plea of *nunquam indebitatus*.

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NANNY.

PER CURIAM.—The plea is clearly bad, as amounting to the general issue. The case referred to by the defendant's counsel may be considered as overruled.

Judgment for plaintiff.

(a) *Ante*, Vol. 4, p. 488.

(b) 2 *Adol. & E.* 414.

SMITH v. BADCOCK.

MARTIN shewed cause against a rule obtained by *Ball* for judgment as in case of a nonsuit. The reason assigned in the affidavit was, that, since the commencement of the action, the defendant had taken the benefit of the Insolvent Debtors' Act.

ALDERSON, B.—The rule must be discharged with costs, unless the defendant consents to a *stet processus*.

Ball submitted, that it was not usual in such cases to give costs.

ALDERSON, B.—It must be with costs—*stet processus*
—or

Rule discharged, with costs (a).

(a) See *Fielder v. Crow*, ante, Vol. 4, p. 50.

It is a sufficient excuse for not proceeding to trial, that the defendant has, since the commencement of the action, taken the benefit of the Insolvent Debtors' Act, and in such case the Court will discharge a rule for judgment as in case of a nonsuit, with costs, unless the defendant consent to a *stet processus*.

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VINER v. LANGTON.

Where a rule has been substantially disposed of, it cannot afterwards be objected, that the affidavits upon which the rule was drawn up are not correctly intitled.

THIS was a motion for setting aside an attachment against the sheriff. The only question was, whether the plaintiff had lost a trial; but it not then appearing on what day the sittings took place, the matter stood over.

J. Jervis, on a subsequent day mentioned the cause, and then objected that the affidavits in support of the rule were not correctly intitled. He referred to *Clothier v. Ess (a)*.

ALDERSON, B.—It is too late to take that objection; the Court decided that the rule should be made absolute, and the only question was, whether the bail-bond should stand as a security in consequence of the trial having been lost. We cannot, after having made a rule absolute, go into the matter now objected to.

It afterwards appearing that no trial had been lost, the rule for setting aside the attachment was made absolute, without the bail-bond standing as a security.

Rule accordingly.

(a) Ante, Vol. 2, p. 731; S. C. 3 Moore & S. 216.

WRIGHT v. SKINNER.

An affidavit cannot be made use of if altered after it is sworn.

PLATT, in shewing cause against a rule obtained by *Chadwick Jones*, took a preliminary objection, that the affidavit which had been filed was altered after it was sworn, by the insertion of the words “the paper writing marked A. is a true copy.”

C. Jones submitted the affidavit was good for such parts as were originally sworn.

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LORD ABINGER, C. B.—The affidavit is a nullity; you cannot make use of an affidavit which has been altered after it is sworn. The rule must be discharged, but without costs.

Platt afterwards waived the objection, and shewed cause upon the merits.

PARTRIDGE v. WELLBANK.

CHANDLESS moved to amend a writ of summons and distringas, and subsequent writs issued to save the Statute of Limitations. The original writ of summons issued in the year 1833, and the distringas in June last. The plaintiff had a cause of action against the defendant on simple contract, but a much larger claim arose upon a bond, and he was therefore desirous of altering the statement of the form of action in the writs, from assumpsit to debt. In support of the motion, he referred to *Horton v. Inhabitants of the Hundred of Stamford (a)*.

The Court will not permit a writ to be amended, unless it appears the plaintiff's remedy would otherwise be entirely lost.

PARKE, B.—It appears here, that the debt on the bond is not barred by the statute. It will be found that the principle of all the cases in which a writ has been allowed to be amended is, that otherwise the remedy would have been entirely lost.

LORD ABINGER, C. B.—This amendment should not be allowed.

Rule refused.

(a) Ante, Vol. 2, p. 196.

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BACON v. ASHTON.

The Court will not set aside a plea because it commences with a formal defence.

SHEE moved for a rule to shew cause why the plea delivered in this case should not be set aside for irregularity. The objection was, that the words "comes and defends the wrong and injury when &c.," were used in the commencement of the plea contrary to 10 Reg. Gen. H. T. (a) 4 Will. 4 (Pleading Rules), which gives the form of the commencement of the plea, and says, that no formal defence shall be required.

ALDERSON, B.—You may strike out the part objected to.

Rule refused.

(a) Ante, Vol. 2, p. 319.

WARD v. WATT.

The actual or supposed residence of a defendant must be stated in a writ of capias.

ARCHBOLD moved for a rule to shew cause why the copy of the writ of capias issued in this case should not be set aside for irregularity, and why the defendant should not be discharged out of custody, on entering a common appearance. The irregularity complained of was, that the copy of the writ did not state the defendant's place of residence. He referred to *Rice v. Huxley* (a), and *Roberts v. Wedderburne* (b).

Humfrey shewed cause upon an affidavit, which stated, that the defendant had no settled place of residence; the debt was contracted some time since at Cheltenham, and the plaintiff had lately seen the defendant in London, but could not discover his place of abode; he had also seen a letter from the defendant to his attorney, which was dated

(a) Ante, Vol. 2, p. 231.

(b) Ante, Vol. 2, p. 816.

London, merely. In *Welsh v. Langford* (a), Taunton, J., draws a distinction between a writ of summons and capias, and observes, that in the writ of summons the act expressly requires a particular description of the defendant's residence, but in the capias it is enough if he is so described as to enable the officer executing a process to find him. And in *Buffle v. Jackson* (b), it was held, that the description of the defendant's residence need not be particularly given, but the plaintiff may give such a description of it as he can. These decisions are recognised in *Hill v. Hervey* (c), where the same distinction is preserved between the writ of summons and capias.

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LORD ABINGER, C. B.—In all the cases cited there was some description of the defendant, the best the plaintiff could give, and the Courts held that sufficient; but here there is no description at all. The rule must therefore be absolute.

Rule absolute, without costs.

(a) Ante, Vol. 2, p. 498.

(b) Ante, Vol. 2, p. 505.

(c) Ante, Vol. 4, p. 163.

WELLS v. ODY.

CASE for obstructing the ancient windows of the plaintiff's dwelling-house, by wrongfully erecting a wall. Plea—not guilty. At the trial of the cause, it appeared that the obstruction was caused by a wall built by the defendant, part of which stood on the plaintiff's and part on the defendant's land. The jury found that the injury complained of resulted from that portion of the wall which stood on the plaintiff's land. A verdict having been entered for the plaintiff, *Kelly*, in last Hilary Term, moved to enter a nonsuit, on the ground that, under these cir-

Where a party has sustained an injury, which forms the subject of an action of trespass, and there is also a consequential damage, he may sue in case, or trespass, at his election.

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cumstances, *case* was not maintainable, but that the form of action should have been *trespass* (a).

Bompas, Serjt., and *Humfrey*, shewed cause, and contended, that, where a party has a cause of action in trespass, he is not bound to pursue that remedy, but may waive the trespass, and bring case. *Branscomb v. Bridges* (b), *Smith v. Goodwin* (c).

Kelly, R. V. *Richards*, and *Adolphus*, in support of the rule.—The jury having found the injury caused by that part of the wall which stood on the plaintiff's land, trespass was the proper form of action. If the defendant were justified under the Building Act, that would be matter of defence, and the plaintiff could shew excess, which would make the defendant a trespasser ab initio. Suppose the case of a licence to do an act upon the land of another, which act is done in such a way as to be attended with injurious consequences, under such circumstances case could not be maintained, but the proper form of action would be trespass; and if the defendant pleaded the licence, the plaintiff might reply excess. Admitting that, where there is both an immediate and a consequential injury, the plaintiff may have his election, and bring either trespass or case; here, trespass alone will lie, for the jury have found that the injury was immediate, and not the consequence of the building on the defendant's land.

LORD ABINGER, C. B.—No case has been adduced to shew that, where an injury has been done, which partly forms the subject of an action of trespass, and partly of

(a) It was also objected, that the action could not be maintained, as the wall was a party-wall, and the plaintiff had neglected to give the notice required by the Build-

ing Act, 14 Geo. 3, c. 23.

(b) 2 D. & R. 256; 1 B. & C. 145.

(c) 2 Nev. & M. 114; 4 B. & Adol. 413.

an action on the case, the plaintiff is bound to maintain one action in preference to another; but, under such circumstances, there is nothing to preclude him from bringing an action on the case, in respect of that fact, from which the consequential injury arises, or an action of trespass, in respect of that part which causes the immediate injury. The argument, that case cannot be brought, because part of the injury resolves itself into an action of trespass, is perfectly untenable. If that argument were good, it would prove that the plaintiff could have no remedy whatever, for by the same reason he could not maintain trespass, because he has a cause of action in case. The deductio ad absurdum is sufficient to shew, that the plaintiff might bring either trespass or case. If a water-course be disturbed, and an injury caused by taking away a weir, one side of which is on the plaintiff's, and the other on the defendant's land, trespass is maintainable in respect of the removal of that part which was on the plaintiff's land; the injury resulting from the removal of that part which was on the defendant's land, would form the subject of an action on the case. If both acts were done at the same time, and the consequential injury resulted from both, the plaintiff might bring either trespass or case. There are not wanting sufficient authorities to shew, that where an injury has been done, which gives one right of action or the other, the party injured may bring either. If a nuisance, committed in one county, produces an effect in an adjacent county, the indictment may be laid in that county. However specious the argument against it, the result is, that in this case the party might have brought either the one or the other. It has been urged that he could not sustain any injury, except from that part of the wall built on the plaintiff's land, for such is the finding of the jury. It is clear, however, the jury could not have meant that, because it is not consistent with common sense, that that part alone which stood on the plaintiff's

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land obstructed the light, unless the other part, which stood on the defendant's land, was transparent.

PARKE, B.—I entirely concur with the Chief Baron. There are numerous cases where the party injured may maintain trespass, or case, for the consequential damage. In *Moreton v. Hardern* (a), where an action on the case was brought against three proprietors of a stage-coach, and one of them was driving at the time of the injury, it was held that the action might be maintained, although trespass was also maintainable against the one that was driving. So, in *Williams v. Holland* (b), where the injury resulted from the negligence of the defendant, case was held maintainable, notwithstanding the act was immediate. The same law will be found in *Comyn's Digest*, title *Action on the Case*. Every act of projecting eaves, so as to cause injury to the roof of another's house, is an act of trespass, and yet the form of action usually adopted is case. I am disposed to think, that, whether the wall stands wholly on the plaintiff's land, or partly on the plaintiff's and partly on the defendant's, case may be maintained. As the present action is for the consequential injury done to the plaintiff's lights, I think case is the more proper form.

BOLLAND, B., I am of the same opinion.

Rule discharged.

(a) 6 D. & R. 275; 4 B. & C. 223. (b) 3 Moo. & S. 540; 10 Bing. 112.

CURZON v. HODGES.

The Court will not discharge a defendant out of custody, on the ground that the debt for which he has been arrested is founded on an illegal consideration, and an injunction has issued from the Court of Chancery to stay proceedings at law; if, however, the process of the Court has been abused for the purpose of oppression, the Court will interfere.

C. JONES moved for a rule nisi to discharge the defendant out of custody. He had been arrested on a pro-

missory note for 798*l.*, and had put in bail, but the bail subsequently rendered him. The consideration for the note was a gambling debt, and the defendant, since the commencement of the action, filed a bill of discovery in the Court of Chancery. The plaintiff had not put in any answer to the bill, consequently an injunction had issued, staying the proceedings at law. It was sworn, that the plaintiff kept out of the way to avoid service of the subpoena.

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LORD ABINGER, C. B.—When it clearly appears that the process of the Court has been obtained for the purpose of oppression, we shall be ready to grant relief; but the Court will not try upon affidavit the illegality of the consideration of a promissory note.

PARKE, B.—There is no precedent in this Court of a person being let out of prison because proceedings are pending in the Court of Chancery.

Rule refused.

—◆—
 STRONG *v.* DICKENSON.

THE defendant having been arrested on a ca. sa., *F. V. Lee* obtained a rule nisi for discharging him out of custody, on the ground that his residence was omitted in the writ.

The Court of Exchequer will not discharge a defendant out of custody on account of the omission of his residence in the writ of ca. sa.

Platt shewed cause, and contended that the object of requiring the defendant's residence to be indorsed on a writ of ca. sa. was merely to protect the sheriffs, but that it did not render the writ a nullity. Besides, there was no rule in this Court which required such an indorsement. The rule of H. T. 2 & 3 Geo. 4, applied to the Court of King's Bench only.

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F. V. Lee, in reply, cited *Constable and another v. Fothergill* (a).

PARKE, B.—There is no rule in this Court requiring the indorsement of the defendant's residence on a writ of ca. sa.

Rule discharged, with costs.

(a) Ante, Vol. 2, p. 591.

WHIPPLE v. MANLEY.

The record is conclusive evidence of the day on which the writ issued; and if a wrong day has been inserted, the proper course is to apply to the Court to amend the record at the cost of the plaintiff's attorney.

IN this case the defendant had pleaded a tender, to which the plaintiff replied a writ previously issued. At the trial of the cause before the under-sheriff of Devonshire, the defendant's counsel tendered evidence to shew that the writ issued after the day stated in the record. The under-sheriff refused to admit this evidence, and the jury found a verdict for the plaintiff.

Greenwood now moved for a new trial, on the ground of the rejection of this evidence. He cited *Lester v. Jenkins* (a), where *Bayley*, J., in delivering judgment, says, "It is clearly established by authorities, that either party may shew by evidence the actual time of the commencement of the suit to be different from that it purports to be by the record."

PER CURIAM.—Since the new rules, the precise day on which the writ issued must be stated in the record; and as the record is framed according to rules made in pursuance of an act of Parliament, it is conclusive evidence of the facts stated therein. If the wrong day has been inserted, the proper course is to move for a rule to shew cause why the record should not be amended at the cost of the plaintiff's attorney.

Rule refused.

(a) 2 Man. & R. 429; 8 B. & C. 339.

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KINTON v. BRAITHWAITE.

KNOWLES moved for a rule to shew cause why the verdict in this case should not be set aside, and a new trial granted, on the ground of misdirection by the Judge. The action was brought for goods sold and delivered, and the defendant pleaded a tender. At the trial of the cause, before the under-sheriff of Middlesex, it appeared in evidence that the plaintiff's attorney had written to the defendant, that, unless the sum of 3*l.* 8*s.*, the amount claimed, together with 5*s.* for the letters, was paid at his office, immediate proceedings would be taken. Upon the receipt of this letter, the defendant's attorney went to the office of the plaintiff's attorney for the purpose of paying the money, and saw there the clerk of the plaintiff's attorney; but on tendering 3*l.* 8*s.* to him, the clerk said he had no authority to receive it, and recommended the defendant's attorney to call at twelve o'clock the next day, stating that he would, in the mean time, inform his master. The defendant's attorney called at eleven o'clock the following day, when he was served with a copy of the writ. The under-sheriff told the jury that if they believed the money was produced, there was, in his opinion, a good tender. The jury found a verdict for the defendant.

Where a person demands the payment of money at his office, such demand amounts to a special authority for his clerk there to receive it; therefore, in his absence, a tender to the clerk is a good tender, although he states that he is not authorized to receive the money.

Humfrey shewed cause, and relied on *Barrett v. Deere* (a), in which it was held that a payment to a person in a merchant's counting-house, who appeared to be intrusted with the conduct of his business, is a payment to the merchant, though it turns out that the person was never employed by him.

Knowles, in support of the rule, contended that there was a misdirection, inasmuch as the under-sheriff should have directed the jury to consider whether there was any

(a) 1 M. & M. 200.

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authority to receive the money, it having been tendered to a person who was not the agent of the plaintiff.

LORD ABINGER, C. B.—This rule must be discharged. The letter of the plaintiff's attorney was the only authority for the defendant to pay the money at the office; and the meaning of that letter was, that there would be some one there to receive it. As to the expenses of the letter, I think there was no ground for exacting them (a).

PARKE, B.—I at first felt some doubt in this case. A tender, to be good, must be made to the plaintiff, or to some person authorized by him to receive the money. Without the letter, the tender would not be sufficient; but my doubt is, that the letter gave no authority to receive less than 3*l.* 13*s.* 6*d.* I think, however, the plaintiff is not entitled to the expenses of the letter, and that there was a special authority to the person in the office to receive the money tendered.

BOLLAND and GURNEY, Bs., concurred with Lord ABINGER.

Rule discharged.

(a) See *Morison v. Summers*, ante, Vol. 1, p. 325.

FISHER v. WAINWRIGHT.

The first count stated a special contract to indemnify the plaintiff against costs he might incur by pay-

ing a bill of exchange drawn by the defendant, and suing the acceptor thereof. Second count on the bill, and money counts. The first particulars delivered were applicable to the second count only. A Judge then made an order for particulars under the first count, which particulars referred to the costs named by the plaintiff, and the amount of the bill. The jury having found a verdict for the plaintiff on the account stated, and for the defendant on all the other counts:—*Held*, that the second particulars were sufficient to enable the plaintiff to recover on the account stated, and that the defendant had not been misled by them.

ASSUMPSIT.—The first count of the declaration stated, that a bill of exchange, made and drawn by defendant upon, and accepted by one W. H. G., whereby

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the defendant required the said W. H. G. to pay to the order of the plaintiff 30*l.*, in three months after the date thereof, (which said bill of exchange had been indorsed by the defendant to one M. W., who had indorsed the same in blank), was lying due and unpaid at the Bank of England; and thereupon, in consideration that the plaintiff, at the request of the defendant, would take up the said bill, and pay the amount thereof for the honour of the defendant, and would commence and prosecute an action against the said W. H. G., upon and for the recovery of the amount of the said bill, in the name of the plaintiff, as the indorsee thereof, the defendant then promised the plaintiff to pay him the amount of all such costs, charges, and expenses, as he the plaintiff should incur, bear, sustain, and be put unto, for and by reason of his commencing and prosecuting such action against the said W. H. G., in case the plaintiff should be unable to obtain the same from the said W. H. G.; that plaintiff took up the bill, and paid the amount thereof for the honour of the defendant, and commenced and prosecuted an action against the said W. H. G., in the name of the plaintiff, as the indorsee thereof, and then necessarily was put to divers costs, charges, and expenses, in the whole amounting to the sum of 11*l.* 14*s.* 6*d.*; that the said W. H. G. afterwards became bankrupt, and that the plaintiff had not been able to obtain payment of the said sum of 11*l.* 14*s.* 6*d.* from the said W. H. G., whereby the defendant became liable to pay the same to the plaintiff on request, yet the defendant hath wholly refused. Second count, by plaintiff, as indorsee, against defendant, as drawer of the same bill of exchange; and that, although defendant had paid a part of the said bill, the sum of 21*l.* 8*s.* remained unpaid. Counts for money paid, interest, and on an account stated.

Pleas—to first count, payment of 4*l.* into Court; to second count, payment of a part in discharge, and a de-

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livery in respect of the residue of another bill of exchange which was not then due. To the money counts, non-assumpsit. Replication to first plea, that plaintiff had sustained damage to a greater amount than 4*l.*; to second plea, that defendant did not pay the money therein mentioned; and that the bill of exchange in that plea mentioned was indorsed by the defendant to the plaintiff, to be kept by him as a security, on the plaintiff's forbearing to proceed against the defendant in the said bill in the said second count mentioned, until a certain day, when the defendant then promised the plaintiff to pay him the said sum owing upon the said bill. Rejoinder, traversing that the defendant indorsed the bill upon the terms and conditions in the replication mentioned.

A summons was taken out for particulars of the plaintiff's demand, which were delivered as follows:—The plaintiff seeks to recover the principal sum of 27*l.* 8*s.* 6*d.*, being the balance of a sum of 30*l.*, money paid and advanced by the plaintiff for the honor of the defendant, to take up a bill of exchange drawn by the defendant upon, and accepted by one W. H. G., and a further sum for interest thereon to the day of payment, or of signing a final judgment. Upon the receipt of these particulars, a second summons was taken out for particulars under the first count. They contained a claim of 11*l.* 14*s.* 6*d.* for costs as between attorney and client in the action against W. H. G.; and also the sum of 30*l.*, the amount of the bill, and 10*s.* interest, making in the whole 42*l.* 4*s.* 6*d.* The action was tried before Lord *Abinger*, C. B., at the sittings after last Hilary Term, when the jury found a verdict for the plaintiff for 7*l.* 10*s.* 6*d.* on the account stated, and for the defendant on all the other counts.

Kelly now applied for a rule for a new trial, on the ground that the defendant was taken by surprise, inasmuch

as there was no demand in the particulars applicable to the account stated. He cited *Brekon v. Smith* (a).

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Bompas, Serjt., and *W. H. Watson*, shewed cause.—The second particulars do not refer expressly to the first count; they are intended to cover the whole of the declaration. If a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction (b). Where the plaintiffs, spirit merchants, delivered particulars for goods sold to defendant in their trade as brewers, and a verdict was found for the plaintiffs on proof of delivery of spirits, the Court discharged the rule for a new trial, it appearing that the defendant had neither been surprised nor misled. There the defendant could not have been taken by surprise; there is nothing in the second particulars to induce him to suppose the plaintiff had rejected his claim upon the account stated.

F. Kelly, and *Bushy*, in support of the rule.—The particulars are calculated to mislead the defendant. The first particulars were only applicable to the count on the bill, and for money paid; the defendant then takes out a summons for particulars under the first count; and the Judge's order, under which they are delivered, expressly refers to the first count. It was natural, therefore, for the defendant to suppose the plaintiff meant to rely on that count only. The plaintiff, by his first count; only claims an indemnity for the costs out of pocket, and more than sufficient to cover them has been paid into Court.

LORD ABINGER, C. B.—The substantial question is,

(a) 1 Adol. & E. 488.

(b) *Brown v. Hodgson*, 4 Taunt. 189.(c) *Lambirth v. Roff*, 8 Bingh. 411.

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whether the defendant has been misled. The second particulars are not confined to the first count, but are for the bill of costs mentioned in the first count. I think the defendant has had full notice of all the plaintiff sought to recover. Suppose he had put at the bottom of the particulars—"the plaintiff means to avail himself of any or either of the counts contained in the declaration;" those words would have made no difference, they are surplusage. It seems to me the defendant has not been deceived by the bill of particulars, and that the plaintiff has not abandoned any of the counts in his declaration.

PARKE, B.—I am of the same opinion. These particulars are inartificially framed; but it appears to me the defendant must have understood that the plaintiff meant to go for the whole bill of costs, and not to confine his demand to one count.

BOLLAND and ALDERSON, Bs., concurred.

Rule discharged.

ROLFE and Another v. SWAIN.

Where defendant was described in the capias as a clerk in the Army Pay Office, Somerset House, the Court held the description insufficient, and set aside the writ.

BUSBY moved to set aside a writ of capias, on the ground that it did not state the defendant's place of residence. The defendant was described in the writ as "a clerk in the Army Pay Office, Somerset House;" and the affidavit upon which he moved stated that the Army Pay Office was at Whitehall, and that deponent was informed and believed there was no Army Pay Office at Somerset House. It was submitted this was not a compliance with the form in the schedule to the 2 Will. 4, c. 39, No. 4, and reference was made to *Roberts v. Wedderburn* (a).

(a) Ante, Vol. 2, p. 816; 1 Bing. N. C. 4.

W. H. Watson shewed cause, and contended that the object of requiring the indorsement of defendant's residence was to inform the sheriff, and that the defendant could not take advantage of its omission. *Clarke v. Palmer* (a). Since the Uniformity of Process Act, the Courts have not in all cases required the true residence to be stated: it has been held sufficient if the party could be found by the description given. *Hill v. Harvey* (b). In *Welsh v. Langford*, Taunton, J., says, "It does not appear from the form of the *capias* that any very particular description of the defendant's residence is necessary in that writ, but it is enough if he is so described as to enable the officer executing the process to find the defendant."

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PER CURIAM (c).—We think the decision of the Court of Common Pleas in *Roberts v. Wedderburn* should be adhered to. The plaintiff must insert either the real or the supposed residence of the defendant: if he cannot discover the defendant's residence, it is sufficient if he give the best description that he is able. In *Hill v. Harvey*, there was a description of the defendant; but we cannot concur in the observation made in that case, that a description *personæ* alone would be sufficient.

Rule absolute.

(a) 4 Man. & R. 141; 9 B. & C. 153. (c) Bolland, Parke, and Gurney, Bs.
(b) 2 C. M. & R. 307.

GRANT v. SMITH.

HALCOMB moved to set aside a judgment. The cause was in error coram vobis, and the defendant had delivered the common joinder in error without the signature of counsel, upon which the plaintiff signed judgment. It

The common joinder in error does not require counsel's signature.

By 38.4 W. 4, sec. 1. and any Rule or Order made after such time aforesaid, be binding and oblige and all other Courts of Common Law."

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~~joinder~~ did not require counsel's signature.

The *Attorney-General* shewed cause upon an affidavit of a clerk of Mr. Edgell, the Clerk of the Errors in the Exchequer Chamber, which stated that he had never seen a joinder in error without its being signed by counsel. Mr. Dax also stated that the practice was to have the joinder signed.

PARKE, B.—The authority of Mr. Tidd is against you; but as it is purely a question of practice, it must be settled by the officers of the Court.

The Court then sent to inquire of the Masters of the King's Bench and the Prothonotaries of the Common Pleas; and they having reported that the common joinder need not be signed by counsel, the Court made the rule absolute.

Rule absolute.

(a) Tidd, 1175; Arch. by Chit., 3rd ed., 352.

GRAHAM v. PARTRIDGE.

Since the new rules, a set-off must be specially pleaded.

DEBT for goods sold and delivered, and on an account stated. Plea, *nunquam indebitatus*, with notice of set-off.

At the trial of the cause before Lord Abinger, C. B., at the last assizes for the county of Warwick, the defendant's counsel tendered evidence of the set-off, but the learned Judge refused to admit it, on the ground, that, since the new rules, a set-off should be specially pleaded. The jury found a verdict for the plaintiff for the amount claimed.

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Humfrey now moved for a new trial, on the ground of the rejection of this evidence, and contended that the new rules did not apply to the case of set-off. The 3 & 4 Will. 4, c. 42, s. 1, which gave the Judges the power of making alterations in the mode of pleading, provided, "that no rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now, or hereafter shall be, entitled to do so by virtue of any act of Parliament now or hereafter to be in force." The rules of Hilary Term, 4 Will. 4, which alter the mode of pleading, also provide that "no rule or order shall have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do by virtue of any act of Parliament then or thereafter to be in force." It was submitted therefore, that, by 3 & 4 Will. 4, c. 41, s. 1, the Judges had no jurisdiction to require a set-off to be pleaded specially; for the 2 Geo. 2, c. 22, s. 13, enacts, "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other, and such matter may *be given in evidence upon the general issue*, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

Goulburn, Serjt., and *Haines*, shewed cause.—The proviso in the 3 & 4 Will. 4, c. 42, s. 1, applies to the case

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of magistrates, constables, and others, acting under a legal authority, and who are enabled by particular statutes to dispute the plaintiff's case, and give in evidence any matters of defence under the general issue. To hold that a set-off need not be pleaded, would be to bring within the proviso a defence which may be set up by all persons whatsoever. The proviso is, that no rule shall deprive a person of pleading the general issue, and giving the special matter in evidence in any case wherein he is entitled to do so by virtue of an act of Parliament. Now, it will be observed, that the 2 Geo. 2, c. 22, s. 13, does not enable a defendant to give the special matter in evidence under the general issue, but on the contrary it has a restrictive force; it says, a set-off shall not be given in evidence under the general issue, unless a notice be also given; otherwise it must be pleaded specially. In *Oldershawe v. Thompson* (a) it was held, that in covenant, upon non est factum, with notice of set-off, the defendant could not go into evidence of the set-off. Should a set-off be allowed to be given in evidence under nunquam indebitatus, how is the judgment to be entered, if the defendant prove his set-off? The issue is, whether or no the defendant was ever indebted, and if the plaintiff proved his case he would be entitled to a verdict on that issue; and yet, as the defendant succeeds on the set-off, he would have to pay costs to him: assuming, then, that a set-off could be given in evidence under the old plea of nil debet, it clearly cannot under the new form of nunquam indebitatus.

The Court then called upon—

Gale, in support of the rule.—Where an act of Parliament enables a person to plead the general issue, and give the special matter in evidence, no alteration of the form of the general issue can deprive him of that right. The

(a) 5 M. & S. 164.

plea of *nunquam indebitatus* is a mere substitution for *nil debet*; the case therefore stands upon the same ground as if the latter plea had been pleaded. Set-off was not a defence at common law; and as before the 2 Geo. 2, c. 22, it could not be set up in answer to the plaintiff's case, it necessarily follows that it must be pleaded by force of, and is a special defence created by, the statute. The notice has no effect upon the form of the plea; it is a mere intimation that the defendant means to trust to his set-off in answer to the plaintiff's demand. *Oldershaw v. Thompson* was decided on the ground that *non est factum* was not the general issue.

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LORD ABINGER, C. B.—This rule must be discharged. I determined, on a superficial view, that, since the new rules, a set-off must be pleaded; but it was questionable whether the Judges had the power to require it under the 3 & 4 Will. 4, c. 42, s. 1. It is contended that the 2 Geo. 2, c. 22, s. 13, which enables the defendant to give a set-off in evidence, comes within the proviso of the 3 & 4 Will. 4, c. 42, s. 1; but I am of opinion that the intention of that proviso was to except those cases only where the general issue has been given by statute for the protection of persons engaged in some duty, as magistrates, constables, and others acting under the 21 Jac. 1, c. 12; the 6 Geo. 2, c. 22, s. 13, applies to all the King's subjects, and it could never have been intended to give all persons the benefit of the proviso in the 3 & 4 Will. 4, but only particular individuals. The plaintiff's counsel has given a complete answer, by shewing that the statute of set-off does not give the general issue. It enacts, that where there are mutual debts between either party, one debt may be set off against the other, and such matter may be given in evidence upon the general issue, or it may be pleaded specially. It then goes on to state, that where the general issue is pleaded, the party must give notice of the debt

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intended to be insisted on. This, then, is not a liberty to plead the general issue, but a restraint upon it; instead of enabling the defendant to give the special matter in evidence under the general issue, it restrains him from so doing unless he has given a notice.

PARKE, B.—I am also of opinion that this rule must be discharged. It is quite certain the Judges who framed the new rules could never have intended to except the case of set-off, but still they might be mistaken in the construction they put upon the proviso in 3 & 4 Will. 4, c. 42. I think, however, since the ingenious argument of the plaintiff's counsel, there can be no doubt on the subject. It is quite clear that the proviso was intended to apply to those cases only where persons are supposed to be acting beneficially for the public, and was not meant to extend to private individuals. It is evident the statute of set-off does not enable persons to give the special matter in evidence under the general issue, but on the contrary it is restrictive; it prevents them from giving in evidence that which they would otherwise have been enabled to do. There is great weight in the argument, that if the defendant is entitled to plead the general issue, and give notice of set-off, this is not the species of general issue intended; and if the Judges were not authorized to make the rule, the defendant should have pleaded *nil debet*. It is quite clear he cannot give this evidence under the plea of *nunquam indebitatus*.

BOLLAND, B.—I am of the same opinion.

Rule discharged.

KING'S BENCH PRACTICE COURT.

Trinity Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

FENTON *v.* ANSTICE.

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IN this case a rule was obtained by *Bagley* to set aside a judgment for irregularity. The declaration was delivered on the 25th of April, without any notice to plead. On the 30th of April a rule to plead was given; and on the 16th of May a demand of a plea was served on the defendant's attorney, who delivered a plea on the 20th of May, but was subsequently informed that judgment had been signed on the 19th of May.

In actions in which imparlance is abolished, the defendant is still entitled to notice to plead before judgment can be signed for want of a plea.

Addison shewed cause.—The only question is, whether a notice to plead was necessary under the circumstances of this case. It is true that Mr. Tidd states the practice to be, that “when a declaration is delivered absolutely after appearance, a notice to plead must be given (a);” but he refers to the rule of Court, Trinity Term, 5 & 6 Geo. 2, as the foundation of the practice. The rule is in these words:—“It is ordered, that, upon all process to be sued out of this Court, returnable the first or second return of any term, if the plaintiff declares in London or Middlesex, and the defendant lives within twenty miles of London, the declaration shall be delivered with notice to plead within four days next after delivery thereof; and the defendant shall plead within the same four days

(a) Tidd's Prac. 9th edit. 473.

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without any imparlance, and in default of pleading as aforesaid the plaintiff may sign his judgment, any rule of this Court to the contrary notwithstanding (a)." Here, then, the notice to plead was only required where the defendant was entitled to an imparlance before the rule, and, in the cases coming within the rule, the notice to plead was substituted for the imparlance. By the Uniformity of Process Act (b), however, imparlance was abolished altogether, and it was submitted that a notice to plead was therefore no longer necessary. But in this case the defendant had ample notice. The defendant appeared to the action by his attorney; and it appeared, from the affidavit against the rule, that the person who received the declaration, upon looking at the indorsement, said, "I have been expecting this a long time," and made no objection to the want of a notice to plead. In a case in the Common Pleas (c), where a declaration was indorsed "to plead in," and then a blank, the Court held that the defendant was bound to know when he ought to plead according to the practice of the Court, and that no further notice was necessary.

COLERIDGE, J.—It seems to me that the Court decided no more in that case than that an indorsement "to plead in ———," meant the same as if the blank had been filled with "four" or "eight days," as the case might be.

Addison.—At all events, the practice of imparlance being abolished, the notice to plead, which had reference to that practice, is no longer necessary.

Bagley, in support of the rule.—In the case cited, the necessity for a notice to plead was clearly recognised, and

(a) Rules of K. B. p. 4, edit. 1822. (b) 2 & 3 Will. 4, c. 39, s. 11.
 (c) *Hifferman v. Langle*, 2 B. & P. 363.

the Court held that a sufficient notice had been given. There was a subsequent case, however, in which *Hifferman v. Langelle* was referred to (a). In that case the declaration was delivered without any notice to plead, as in the present case; and there was a rule to plead given, and a demand of a plea, but the Court of Common Pleas set aside the judgment, there being no notice to plead.

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COLERIDGE, J.—In that case the declaration was delivered conditionally, which seems to have been relied upon, and distinguishes that case from the present.

Bagley.—All the treatises concur in stating it to be the practice of the Court that notice to plead is necessary. It is true that the statute (b) referred to, has abolished imparlance in personal actions commenced under the new process; but that does not supersede the necessity which previously existed for a notice to plead. That the defendant has been deprived of the advantage of an imparlance, is an additional reason why he should have notice to plead, before a judgment can be signed against him. The fact referred to, that the party who received the declaration said he had been long expecting it, is wholly unimportant. Even if the delivery, without an indorsement of notice to plead, had been irregular, the defendant's attorney was not bound to point it out; but though unusual, such a delivery was not irregular, as a notice might have been given at any time before judgment was signed. The plaintiff, therefore, has endeavoured to snatch a judgment, without giving the defendant that warning to which he was entitled by the practice of the Court.

COLERIDGE, J.—Judgment having been signed within four days after the demand of a plea, it may be taken

(a) *Heath v. Rose*, 2 N. R. 223. (b) 2 & 3 Will. 4, c. 39, s. 11.

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that it was signed in twenty-four hours after demand, and therefore the demand of a plea cannot be considered as equivalent to a plea, and may be left out of the consideration. It is quite clear, under the old practice, according to the case cited (*a*) by the plaintiff's counsel, that a notice to plead was necessary; and the only question is, whether the practice has been altered by the new statute and rules. There has been no alteration in terms, but has there by implication? I entertained some doubt whether the abolition of imparlance might not have rendered a notice to plead unnecessary; but I think the answer given to that argument is a sound one, and that, though imparlance has been done away with, the defendant is entitled to a notice to plead. It follows that, as there was no notice to plead in this case, judgment has been signed irregularly.

Rule absolute, with costs.

(*a*) *Hifferman v. Langelle*, 2 B. & P. 363.

REX v. The Justices of OXFORDSHIRE.

In order to charge the putative father of a bastard child with its support, under the 4 & 5 Will. 4, c. 76, s. 72, the application should be made at the next practicable sessions after the concurrence of the child's birth and the mother's chargeability in respect of it, unless such circumstances appear as justify the Court of Quarter Sessions in entertaining the application at a later period.

CHILTON shewed cause against a rule nisi obtained by *Lumley* for a mandamus to be directed to the Justices of Oxfordshire, commanding them to enter as of last Michaelmas Sessions, and continue to the next Midsummer Sessions, and then hear an application for an order of filiation, pursuant to the 4 & 5 Will. 4, c. 76, s. 72.

Lumley was heard in support of the rule.

Cur. adv. vult.

COLERIDGE, J.—This was an application made before me in the Bail Court, for a mandamus to the Justices

in entertaining the application at a later period.

of Oxfordshire, commanding them to enter *as of last Michaelmas* Sessions, and continue to the next Midsummer Sessions, and then hear an application for an order of filiation. It appeared that the child was born on the 14th of June; no application was made at the Midsummer Sessions, which were held on the 30th. The parties gave the requisite notice, and went to the October Sessions, but discovering there that it would be necessary, under the 72nd section of the 4 & 5 Will. 4, c. 76, to be provided with material corroborating evidence, and having come with none, made no application then; at the Hilary Sessions, 1836, an application was made, which the magistrates refused to hear. It was admitted, that the writ could not issue in the terms prayed for, but it was urged that the parties were entitled to relief, and that the Court should mould the writ so as to effect that purpose.

The question turns entirely upon the construction which the section above mentioned ought to receive. That enacts, that "When any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, &c., may, if they think proper, after diligent inquiry as to the father of such child, apply to the next General Quarter Sessions of the Peace, within the jurisdiction of which such parish shall be situate, after such child shall have become chargeable, for an order, &c." I have no doubt, that, in construing the words, "next sessions," I ought to apply the decisions upon similar words in former statutes, which give appeals against orders of removal and poor rates, and to hold them to mean the next sessions previously to which the requisite notice can be given, and at which, reference being had to all the circumstances, it is reasonable to expect that the parties should be prepared to go to the hearing of the application. And I think it is fitting to lay it down as a rule, that the statute does not require the applicants to undergo the un-

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necessary expense of entering and respiting at a sessions at which it is impossible that the parties should be prepared to substantiate the case—a circumstance, it should be observed, which may fairly be expected to occur with regard to nearly one-third of all the applications arising between any two given sessions.

So far is clear; but a question then occurs, to which event or events the word “next” has properly relation; three are previously mentioned; the two former, “the birth of the child, and the chargeableness of the mother,” are certainly conditions precedent to the application; the last, “diligent inquiry by the overseers as to the father,” may, perhaps, be directory only.

In the present case it was admitted that the chargeableness had commenced with the birth, and that sufficient inquiry as to the putative father had been made in time to bring on the hearing at the October Sessions. It would seem, therefore, that, in any view but one, the application at the Hilary Sessions was too late. But it was contended that the fact of chargeableness was in its nature renewing from day to day—that, as the continuance of a trespass was a new trespass, so a continued chargeableness was a new one every day—and that the parish officers were not bound to apply upon the commencement, for that the statute might well be construed as leaving them a discretion to relieve the mother and child, which might be prudently exercised if the charge were likely to be of a temporary nature, and the right might yet remain to have recourse to the father at any point of its duration. In support of this it was observed, that the 73rd section, which directs the costs of the maintenance to be calculated from the birth of the child, except where the application should be *heard* more than six months after that event, and then limiting it to the preceding six months, seemed to shew that the Legislature had contemplated the hearing as likely to take place in many instances more than two ses-

sions after the birth of the child. This provision, however, applies to the *hearing*, which may be postponed for many reasons, and has little bearing on the present question.

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Upon consideration of the general policy of that part of the statute which relates to this subject, I am of opinion that the argument cannot be sustained. It is clear that the Legislature intended to impose *some* limitation of time on those applications; but this mode of construing the clause would in effect take away all limitation. It is clear also, that the Legislature intended to throw restraints upon the recourse formerly had to the putative father, and to give him a protection which he had not before: but to hold that the application may, at the discretion of the parish officers, be made at any time during the seven years following the birth, is to introduce a circumstance not merely unfavourable, but unjust to the party charged, as in proportion to the distance of time must be the difficulty of establishing that very species of defence which must, in such cases, be often necessarily relied on; while, on the contrary, there is no injustice in requiring them to elect when the chargeableness commences, whether they will have recourse to the putative father or not.

As a general rule, therefore, I am of opinion that the application must be made at the next practicable sessions after the concurrence of the child's birth, and the mother's chargeableness in respect of it; still, however, leaving room for the exercise of a discretion by the justices in each case of an application made later, where it should appear that the delay had been occasioned by an ignorance of the father, or inability to procure evidence against him. This discretion would be regulated by a consideration of all the circumstances, and mainly whether due diligence had been used; it would be liable also in its exercise to the supervision of this Court.

Applying these principles to the present case, no sufficient reason appears to excuse the delay that has occurred

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—for an ignorance of the plain provision of the statute is not such a reason. The justices have, therefore, in my opinion, exercised their discretion soundly, and this rule must be discharged, but, under the circumstances, without costs.

Rule discharged without costs.

BODENHAM and Others v. RICKETTS.

The Court will not grant a prohibition to an Ecclesiastical Court after sentence pronounced, where it does not appear, either by direct evidence or presumption of law, that any steps are taken or contemplated to enforce it, although a *significavit* issuing upon it may have been quashed.

SIR F. Pollock moved for a rule to shew cause why a writ of prohibition should not issue, directed to the Consistory Court of the diocese of Hereford, commanding them not to proceed with a certain suit which had been promoted in that Court.

Cur. adv. vult.

COLERIDGE, J.—This was an application for a writ of prohibition to the Consistory Court of the diocese of Hereford, in a cause in which sentence has been pronounced, and for an alleged defect appearing on the face of such sentence. The application is made after the sentence has been twice confirmed on appeal, and in Hilary Term last this Court discharged a rule for a prohibition in the same cause; at that time a defect was relied on in an earlier stage of the proceedings, but the defect now insisted on was then in existence, and within the knowledge of the applicant, and had indeed been insisted on in the Court of Chancery, in which an application was made to set aside the *significavit*, proceeding on and reciting that part of the sentence now relied on as disclosing the defect. An application thus made is certainly not to be favoured, but as the writ of prohibition issues of right, not of favour, this Court is bound to grant it, if legal grounds are laid for its issuing.

The rule is now moved for on reading two affidavits

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One of them verifies an office copy of the sentence, which appears to have issued "in a certain cause of subtraction of a church-rate, or other ecclesiastical contribution." A *significavit* issued upon this sentence, and reciting these words, has already been set aside by the Court of Chancery, on the ground that "these words are ambiguous, and do not shew with sufficient certainty the right of the Court to issue the writ; for the other ecclesiastical contribution might not be a matter within the jurisdiction of the Ecclesiastical Court, of which the King's Court ought to be the judges." Many other authorities might be cited to the same effect; and, without canvassing for the present the distinction which may exist between the sentence and the *significavit*, it would certainly be fitting to grant the rule nisi on these authorities, but for the considerations which the other affidavit suggests.

This affidavit is made by Mr. Ricketts himself; and after giving the reasons why he believes the sentence to be illegal, states that two *significavits* have been quashed which had been issued on this sentence—the first for irregularity, the latter for this very defect; that, according to a decision of Sir *J. Nicholl*, an Ecclesiastical Court is never *functus officio* until the decree is obeyed; that two writs *de contumace capiendo* have issued founded upon this sentence, in May last, from the Arches Court and the High Court of Delegates; and that he believes, "unless the Consistory Court is prohibited from all farther proceedings, he *may be* perpetually harrassed by *significavits*, and writs issued in consequence of such *significavits*."

This, then, is a case in which a sentence has been pronounced, alleged to be defective, in which a *significavit* issuing upon it has been quashed for this defect, and in which either the party promovent has not attempted, or the Court itself has not allowed him, to take any step subsequently; nor is any ground alleged from which this

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Court can infer that any proceedings are contemplated. I have always understood in practice, and in principle it should seem to be necessary, that, in order to warrant the issuing of a writ of prohibition, it should appear either that the Court below was *de facto* proceeding, or that there was ground to apprehend it was about to proceed in a matter beyond its jurisdiction, or according to a course in violation of the common law. Where the pleadings are in progress, the Court is proceeding; and if upon their face it appears that the issue *must* be one which the Court ought not to try, it has been decided that a writ of prohibition is not premature. *Byerly v. Windus* (a), *Notley v. Cosens* (b). The judgment of *Buller, J.*, is material to the same point; he says—"The suggestion states that the proceedings are now depending—for, though a sentence has been given, yet the costs have not been paid—and they are now proceeding to compel payment of the costs: then they are, in fact, proceeding in this suit."

In the present case it is not stated that any proceedings are *de facto* being had or contemplated. If the sentence be substantially illegal, and cannot be reformed, why is this Court to presume that the Court below will issue any execution, or take any steps to enforce it, especially after the defect has been pointed out by the superior Court? If, on the other, the defect be of a kind which, by the course of the Ecclesiastical Courts, may be amended by the Court below—as to which I express no opinion, and have no information—why is this Court, by granting the present application, to prevent it from so doing? It is enough, however, to say, that at present I see no ground for issuing a writ of prohibition, because I see no evidence of fact or presumption of law from which any illegal proceeding or intention so to proceed can be inferred.

Rule refused.

(a) 5 B. & C. 22; 7 D. & R. 594.

(b) 1 T. R. 556.

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REX v. The Inhabitants of LEEDS.

NEVILE moved for a certiorari under the 5 & 6 Will. 4, c. 33, s. 1, to remove an indictment to the Borough Sessions, for not repairing a road. The only question in the case was, whether the rule ought to be absolute or nisi in the first instance.

The rule for removing an indictment for non-repairs of a road from an inferior jurisdiction is nisi in the first instance.

COLERIDGE, J.—It must be nisi in the first instance.

Rule nisi accordingly.

BARRATT v. JAMES.

HUMFREY shewed cause against a rule for setting aside the allowance of bail in this case. It appeared by the affidavits, that bail had been put in by the defendant, on the 6th of May. They were excepted to on the 7th, and notice was given by the defendant on the 9th, that they would justify on the 11th, before a Judge at chambers, the 9th being the last day of Easter Term. They did justify accordingly, no opposition being made. The present rule had been obtained to set aside the order for their allowance, on the ground of irregularity. The objection was, that the defendant had no right to justify at chambers, he not having been called upon to do so by the plaintiff. It was, however, contended, that the defendant had a right so to justify his bail, pursuant to the provisions contained in the 11 Geo. 4, & 1 Will. 4, c. 70, s. 12, the words of which were, "that bail may be justified before a Judge in chambers, or some other convenient place to be by him appointed, as well in term as in vacation, and whether the defendant be actually in custody or not." The terms of this provision were general, and must be considered as

A defendant, not in custody, cannot justify his bail at chambers in vacation, unless he is required to do so by the plaintiff, pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 17.

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giving the defendant a right to justify his bail in the manner which he had adopted. On the other side, the rule of 1 Reg. Gen. Hilary Term, 2. Will. 4, s. 17 (a), would be cited. The words of it were, "if bail, either to the action or in error, are excepted to in vacation, and a notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term." The effect sought to be given by the other side to this rule was, to prevent a defendant from justifying at chambers in vacation, unless required so to do by the plaintiff. But, if such a construction were put on the rule, it would be at variance with the statute. The provision contained in the 12th section of it was clearly intended for the benefit of defendants, and therefore ought to be construed liberally. The rule, on the contrary, was for the benefit of plaintiffs, and gave them the option, if they thought proper, to compel the defendant to justify his bail within four days from the time of the notice of exception. But if he did not give such notice, the defendant would have till the first day of the following term to perfect his bail, if he thought proper to take such an advantage. But that did not prevent him from justifying before a Judge at chambers, pursuant to the statute, if he chose to exercise his discretion in that way. The defendant in this case had not availed himself of the delay which the rule afforded him, but had justified at once.

Archbold, in support of the rule, contended that the justification of bail could only take place at chambers, in vacation, in the instance of prisoners, without consent of the plaintiff. The act related to the *place* where the bail might justify, and the rule to the *time* when the justification might be effected, namely, in vacation. The objection to the allowance of bail was not, that it had taken

(a) Ante, Vol. I, p. 185.

place at chambers, but that it had taken place at chambers in vacation. There was no inconsistency in thus construing the statute and the rule, because the former merely permitted an alteration in the old practice as to the *place* in which justification might be effected, and did not at all interfere with the *time* at which it should take place, as prescribed by the rule of Court.

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COLERIDGE, J.—I am inclined to think that the rule of construction laid down by Mr. Archbold is the correct one, in order to reconcile the rule of Court with the act of Parliament; and therefore, that the rule applies to the *time*, under *particular* circumstances, at which the justification is to take place, and that the act applies, under *all* circumstances, to the *place* where the justification may be effected. The present rule must be made absolute, therefore, for setting aside the allowance.

Rule absolute.

— *Filed v. Barratt. 2. 11. 1836.*

LLOYD v. KENT.

SHEE shewed cause against a rule for setting aside a judgment, and execution thereon, on the ground of irregularity. It appeared from the affidavits, that the defendant had been arrested on the 18th of April. An agreement was then entered into between the parties, that a Judge's order should be made by consent for a month's stay of proceedings, without prejudice to the plaintiff's right to bail, and at the end of that time the plaintiff should be at liberty to sign judgment for 60%. Judgment was not signed until six weeks after a Judge's order to this effect had been made, the plaintiff taxing his costs without giving notice to the defendant. The omission to give such notice was the supposed irregularity on which the present

Although a defendant may have appeared in an action, and the plaintiff taxes his costs, without giving notice of taxation, that is not an irregularity sufficient to induce the Court to set aside a judgment and subsequent proceedings.

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application was founded. The rule, on the authority of which the application was made, was 12 Reg. Gen. Trinity Term, 1 Will. 4 (a), the words of which were, "that, before taxation of costs, one day's notice shall be given to the opposite party." These general words, however, were narrowed by 17 Reg. Gen. Hilary Term, 4 Will. 4 (b); and that rule directed, that "notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1 Will. 4, s. 12." The question in this case was, therefore, whether the agreement, pursuant to which the Judge's order had been made, amounted to an appearance by the defendant. If it did not, the plaintiff was not bound to give notice of taxation. But whether it did or not, the omission did not amount to an irregularity sufficient to authorize the Court to set aside the judgment and subsequent proceedings. He cited *Perry v. Turner* (c), where the Court of Exchequer said, "We have cautiously avoided expressing any opinion as to whether a neglect to give notice of taxation of costs gives the defendant's attorney a right to set aside the proceedings for irregularity. The Court has made an order regulating what notice shall be given, but it has not said what the consequences of not following that order shall be. It may be that the Court would consider it as a matter on which they are to use their discretion in each particular case, and that in some cases they would set aside the judgment, in others they would not." All, therefore, that the Court would do, was to refer it back to the Master to tax the bill, as in the present case there was no suggestion that more than the usual costs had been allowed, or that any prejudice had been caused to the defendant by the taxation.

(a) Ante, Vol. 1, p. 105.

(b) Ante, Vol. 2, p. 308.

(c) Ante, Vol. 1, p. 300.

Mansel, in support of the rule, submitted that the question was, whether the defendant had appeared, or done that which was an equivalent to an appearance. If he had, it was clear, by the terms of the rule of Court, that the plaintiff ought to have given notice of taxation. No one could doubt that the defendant had done that which was equivalent to an appearance. The plaintiff had treated the defendant's acts as equivalent to an appearance, by consenting to the Judge's order being made for a month's stay of proceedings. The defendant having done that which was equivalent to an appearance, he was entitled, pursuant to the rule of Court, to a notice of taxation before the taxation proceeded. Not having given one, the plaintiff's proceedings were irregular.

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COLERIDGE, J.—I think that the Judge's order, made by consent of the plaintiff, must be considered as tantamount to an appearance by the defendant; but, after the case of *Perry v. Turner*, I cannot treat the omission of a notice of taxation as an irregularity, so as to set aside the judgment and subsequent proceedings. The parties must again go before the Master, to ascertain whether the defendant has been damnified. If there should be any reduction in the amount at which the plaintiff's costs have been taxed, the plaintiff must pay the costs of this rule; if not, there will be no costs on either side.

Rule accordingly.

— *But see Croft v. Harrison - 20 L.J. C.P. 56.
in Exch. Ch. 21 L.J. C.P. 113.*

GYDE v. BOUCHER.

R. v. RICHARDS shewed cause against a rule nisi obtained by *Denman Whatley* for setting aside an award made in the present case. It was an action on an attor-

Where a cause and all matters in difference are referred to an arbitrator, and by his entire sum, the

award he merely directs a verdict to be entered in favour of the plaintiff for one award is not final, and therefore bad.

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ney's bill, and at the last Gloucester Assizes a verdict was taken in favour of the plaintiff for 50*l.*, subject to a reference of the cause and all matters in difference between the parties; the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator.

Denman Whatley was heard in support of the rule.

Cur. adv. vult.

COLERIDGE, J.—This was a motion to set aside an award made under an order of *Nisi Prius*, by which the cause and all matters in difference were referred. The defendant had been arrested for the sum of 28*l.* 12*s.* 5*d.*, which was claimed as the balance due on a bill previously delivered. At the reference the plaintiff produced a second bill, amounting to 7*l.* 19*s.* 1*d.*, of which the greater number of items bore date previously to the bringing of the action, but some few were for work alleged to have been done subsequently. This second bill was investigated on the reference, and the arbitrator directed a verdict to be entered for the plaintiff in one entire sum of 21*l.* 16*s.* 3*d.*; and it was objected, that, either he had exceeded his authority by including some portion of the latter claim, which was only a matter in difference, in the sum for which he had entered the verdict, or that he had wholly omitted to make any award upon it; and that, as regarded this claim, his award was not final.

I am of opinion that this rule must be made absolute. By the order of reference, the arbitrator was "to take into consideration the cause and all matters in difference, and if he should find that the plaintiff was entitled to recover any damages in the said cause, then he was to ascertain the true amount thereof, and to direct a verdict to be entered for such sum as he should find to be really due,

instead of the nominal damages of 50*l.*; and he was to order and determine what he should think fit to be done by the parties respecting the other matters in dispute." The costs of the cause were to abide the event, and the costs of the reference and award to be in the arbitrator's discretion.

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This being the order of reference, the arbitrator, by his award made of and concerning the matters referred, "*finds and ascertains* that the plaintiff is entitled to *recover damages* to the amount of 21*l.* 16*s.* 3*d.*, and directs that a *verdict* shall be entered for the said sum of 21*l.* 16*s.* 3*d.*, instead of the said nominal damages." Comparing these words with those of the order, I think they must be taken to be a finding only as to the sum claimed in the cause; and if so, there is no finding as to the matters in difference, which yet were investigated before the arbitrator; unless by directing that the defendant should pay the costs of the reference and award; or, by his silence, the arbitrator can be intended to have found that *nothing* was due in respect of these matters. But this intendment is unreasonable and unfounded; and by the uncertainty in which the arbitrator has left this matter, he has subjected the defendant to real inconvenience. As to the cause—if, indeed, the sum of 21*l.* 16*s.* 3*d.* be made up in any part of the latter claim—he is prejudiced in any motion which he might make for costs under the 43 Geo. 3, having been held to bail for a larger sum. As to the matters themselves, he has not that protection against a second action which it was one object of the reference to give him. On these grounds, I think this award must be set aside.

Rule absolute.

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If a cause and all matters in difference are referred to an arbitrator, and he makes a separate adjudication as to the action, the defendant is not precluded from applying for his costs, under the 43 Geo. 3, c. 46, on the ground of other matters in difference being referred in the same submission.

JONES v. JEHU.

J. JERVIS shewed cause against a rule nisi obtained by *Welsby*, for taxing the defendant his costs, under the 43 Geo. 3, c. 46, s. 3, on the ground of the defendant having been arrested for a greater sum than that for which the jury had found a verdict. It appeared from the affidavits, that the plaintiff had arrested the defendant for the sum of 79*l.* 18*s.* The defendant paid into Court 15*l.* When the cause came on for trial, a reference having been proposed, a verdict for the sum of 100*l.* was found for the plaintiff, and the cause, together with all matters in difference, was referred to an arbitrator. The order of Nisi Prius, in the ordinary form, directed that the costs of the cause should abide the event, and the costs of the reference and award should be in the discretion of the arbitrator. After hearing the parties, the arbitrator by his award directed that the verdict should be reduced to the sum of 25*l.* 10*s.* 6*d.* beyond the sum of 15*l.* already paid into Court. It was contended, that the present was not a case within the statute, as from the award it would appear that the arbitrator had determined upon other matters besides those which formed the subject of the action. He cited *Keene v. Deeble* (a) as an authority to shew that where other matters in difference besides those in the action were referred, and taken into consideration by the arbitrator, the statute did not apply. In that case it must be admitted that no verdict had been taken; but that could not vary the case, as it was clear other matters in difference besides those in the action had been considered by the arbitrator. The case of *Thomson v. Atkinson* (b) was to the same effect. On the merits, also, the rule ought to be discharged.

(a) 5 D. & R. 383; 3 B. & C. 491, S. C.

(b) 9 D. & R. 347; 6 B. & C. 193, S. C.

Welsby, in support of the rule, contended that the case of *Keene v. Deeble* was not an authority in the present case, as there no verdict was found; and therefore it could not come within the statute. With regard to *Thompson v. Atkinson*, it was clearly distinguishable from the present case, as there, the arbitrator found a sum to be due on a general balance of accounts. Here, however, the arbitrator made one adjudication on the action, and another on the other matters in difference.

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Cur. adv. vult.

COLERIDGE, J.—This was a motion for allowing the defendant his costs, under the 43 Geo. 3, c. 46. The arrest had been for 79*l.*; at the trial the cause was referred, but a verdict was taken for 100*l.*, to be reduced according to the award. The cause and all matters were referred, the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced to 25*l.* 10*s.* 6*d.*, over and above 15*l.* already paid into Court.

In shewing cause it was contended, upon the authority of *Keene v. Deeble* (a), and *Thompson v. Atkinson* (b), that this was not a case within the statute. It is obvious, however, that there is a distinction in principle between those cases and the present: inasmuch as in *Keene v. Deeble*, no verdict was taken; the money, therefore, could not be said, in the words of the statute, to have been *recovered*; and in the latter, the arbitrator had taken the arrest without reasonable cause into his consideration, as a matter in difference between the parties, and awarded compensation in respect of it. There are, indeed, expressions to be found in the judgments in the former case, which might seem to apply, even where a verdict had been taken; but

(a) 5 D. & R. 383; 3 B. & C. 491. (b) 9 D. & R. 347; 6 B. & C. 193:

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none which extend to such a reference, and such an award as this.

Here, the arbitrator in the first place, reduces the verdict, and disposes entirely of the action; he then adjudicates separately concerning a second action brought by the plaintiff against the defendant, deciding that there was no cause for bringing it, directing it to cease, and the plaintiff to pay the costs; and, lastly, he adjudicates on a third claim by the plaintiff on the defendant, for which no action had been brought, and directs the payment of a sum of money in respect of it to be made on a future day. The arbitrator, therefore, has kept the cause distinct from the other matters, and nothing is stated to shew that, in the trial of the cause before him, any medium of proof was resorted to not available at *Nisi Prius*. I cannot then discern any principle upon which the defendant's rights under the statute as to the cause, thus distinctly tried and disposed of, can be affected by the circumstance, that other matters in difference are, at the same time, and in the same submission, referred to and adjudicated on by the same arbitrator. No such consequence appears to follow as a legal conclusion from such premises; nor can I see any ground for inferring any agreement on the defendant's part to waive such rights.

But, upon the merits, it was contended that this rule should be discharged: and upon looking through the affidavits I am of that opinion. It appears that, before the arbitrator, the plaintiff established every item in his particulars of demand, to an amount exceeding that for which the defendant was held to bail; the reduction of the verdict was occasioned by the defendant's establishing a set-off to the amount of nearly 40%. But it appears to me, that the plaintiff neither did know, nor had reason to suspect the existence of any such demand; in the defendant's affidavit it is not stated that, before the arrest, he had ever made any claim on account of it; in the

plaintiff's affidavits it is positively denied that he ever had, and it is alleged that he had settled an account in which the items should have appeared, but did not; that subsequently to this he had, on several occasions, borrowed money of the plaintiff, and when pressed for payment had been wholly silent as to the present claim; and, further, circumstances are stated, with respect to the transaction out of which the set-off grew, from which it is a reasonable inference that this claim was merely an after-thought. I am therefore of opinion, that the plaintiff, when he arrested the defendant, had a reasonable and probable cause for holding him to bail for the full sum; and this rule must consequently be discharged.

Rule discharged.

WHITE'S Bail.

KNOWLES applied for further time to justify bail. Only one of them appeared. He was prepared with an affidavit, in which it was sworn, that the bail who had not appeared, had been put in by his own consent, and had promised to be present at the sitting of the Court; and that the attorney was unacquainted with the cause of his absence. There could be no objection to the plaintiff's proceeding to oppose the single bail, who did appear.

A defendant cannot justify one bail, who alone appears, without the consent of the plaintiff.

Dowling appeared to oppose the bail, and refused to examine the bail who did appear. The constant practice was not to allow one bail to justify without the consent of the plaintiff. The defendant had no locus standi in Court until two bail appeared. The plaintiff withheld his consent.

COLERIDGE, J.—As the consent of the plaintiff is withheld, and the practice is reported to me by the clerk of the rules as stated on the part of the plaintiff, I cannot interfere.

Bail rejected.

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BARKER v. GLEADOW.

Where a defendant obtains time to plead on the terms of pleading issuably, he is not thereby precluded from demurring specially, for good cause, to the replication.

CROMPTON shewed cause against a rule nisi obtained by *Martin* for setting aside an interlocutory judgment on the ground of irregularity. The objection was, that the defendant had demurred specially to the plaintiff's replication after time to plead had been given, on the usual terms of pleading issuably and rejoining gratis.

Martin appeared in support of the rule.

Cur. adv. vult.

COLERIDGE, J.—This was an application to set aside an interlocutory judgment which had been signed, upon the ground that the plaintiff's replication had been specially demurred to by the defendant, after time to plead given upon the usual terms. Two points were made—first, whether a special demurrer, filed *bonâ fide*, (*and for good cause*), was an issuable plea within the meaning of the undertaking; and, secondly, if it were not, whether that undertaking extended prospectively to all future stages of the pleadings in the cause, or was confined to the stage in which the record was at the time of the undertaking being given. As the authorities on these points are not uniform, I have taken time to consider my judgment.

For the discussion of this case, it may be enough to state, as to the pleadings, that the replication is extremely informal, and, if allowed to stand, would place the defendant's case in a difficult and disadvantageous position; and that the demurrer does not appear to have been filed for the purpose of delay, but with the fair object of relieving the defendant from his position.

Upon the first of the two points above stated, there are not wanting cases, such as *Dewey v. Sopp* (a), and *Lang-*

(a) 2 Str. 1186.

ford v. Waghorn and another (a), in which the undertaking has been construed merely as a restraint from demurring unfairly for delay, and for formal defects entirely collateral to the merits of the cause. Thus, in the last case, where, to a plea of title in trespass quare clausum fregit, the plaintiff had replied generally de injuriâ, and the defendant had demurred specially, the language of the Court is, "the demurrer was a *fair* demurrer, from which the plaintiff is not precluded by the terms of pleading issuably." These cases, however, are met by others, which lay down the rule in a more practicable and definite form, that no demurrer is an issuable plea if it cannot be sustained without assigning the causes specially. This is expressly stated in *Bell v. Da Costa* (b), and is the principle of the decisions in *Blick v. Dymoke* (c), *Newnham v. Dowding* (d), and *Sawtell v. Gillard* (e). In *Nanney v. Kenrick* (f), *Bayley, B.*, says, "that a special demurrer is not an issuable plea, but that if there are good grounds the Court will sometimes strike out the causes;" that is to say, if the demurrer can be sustained without the assignment, the Court will sometimes strike that out, and allow the demurrer to stand as general; which practice seems to be a strong confirmation of his general position, that a special demurrer in form is not an issuable plea. This appears to me at once the most convenient and reasonable rule to establish, because it admits of the most easy and certain application, and leaves no room for questioning in every case whether the demurrer is *bonâ fide*, and goes to the merits or not; for, upon a question of whether a particular demurrer be an issuable plea or not, those inquiries are irrelevant; and because it imposes nothing hard upon the defendant, who, by the hypothesis, has become unable to make the defence on which he wishes to rely in

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(a) 7 Price, 670.

(b) 2 B. & P. 446.

(c) 8 Moore, 427; 1 Bing. 379.

(d) 1 Chitty, 711.

(e) 5 D. & R. 620.

(f) Ante, Vol. 1, p. 610.

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the time allowed by the practice of the Court; and who, if he had intended to rely on any formal defects in the declaration, should at all events have done so within that time, because he must have been apprized of them, and the inconvenience, if any, which he sustained thereby, as soon as the declaration was delivered; who is therefore called upon to pay a price for an extension of time to put in a defence, which may fairly be presumed to be intended to be a substantial one; that price being in effect an agreement on his part to speed the cause to its conclusion, and to bring it to an issue on the substantial merits of law or fact, without regard to any formal inaccuracies in the plaintiff's statement.

I am of opinion, therefore, that if this be to be considered as a demurrer to the declaration, the judgment will have been rightly signed. But it remains to consider the second point—whether, namely, the undertaking was limited to the state of the record at the time of its being given, or extended to every future step in the pleadings. The latter is assumed in the cases of *Dewey v. Sopp* and *Bell v. Da Costa*, before cited, with nothing said expressly on this particular point; and it is decided in *Sawtell v. Gillard*, the Lord Chief Justice *Abbott* saying, “that the undertaking is not performed if the party by his pleading fails to bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue.” The argument of counsel, however, did not bring this particular point, or a prior and contrary decision in the Common Pleas, to the attention of the Court, which somewhat detracts from the authority of the case. On the other hand, in the case alluded to, of *Betts v. Applegarth* (a), the attention of the Court of Common Pleas was distinctly drawn to the point, and they decided that “the order for time under terms of pleading issuably must apply

(a) 12 Moore, 501; 4 Bing. 267.

to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors." I do not rely upon *Langford v. Waghorn and another*, because the decision proceeded on another ground; nor upon *Gisborne v. Wyatt* (a), in which, however, my Brother *Parke* appears to have been of opinion that it was not intended by the undertaking that the plaintiff should be allowed to reply double.

Upon this state of the authorities it is necessary to make an election, and in a matter of practice we are allowed, and we ought, to adopt that rule which, upon the whole, may appear the most convenient and equitable. It has been suggested to me by high authority, that the rule laid down in *Sawtell v. Gillard* is the most proper to be adopted, with this qualification, that the defendant should be at liberty, whenever the plaintiff's replication was informal, so as to embarrass him in his defence, to apply to the Court or a Judge to relieve him from his undertaking, and to be allowed to demur specially. By this provision, it is said, the plaintiff will be sufficiently kept in check, and the defendant protected; while, by the rule itself, the great evil of delay by demurrers for form will be prevented. It is added, that it would be convenient, with the same object in view, if the power to demur specially could be brought under the control of the Court in all cases, and that we ought to avail ourselves of the opportunity to exercise that control over it in the numerous instances which the giving time to plead would thus afford. I have considered this opinion with the attention it deserves; but the conclusion to which I have come is in favour of the rule laid down by the Court of Common Pleas, considering the two rules without reference to the qualification suggested as to the former. The latter appears to me the more convenient, because it tends to preserve the regu-

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(a) Ante, Vol. 3, p. 505.

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larity and correctness of special pleading, an object of the highest concern in the administration of the law; whereas the former has a direct tendency to encourage carelessness at least, if not unfairness, in the plaintiff's pleading; informality in pleading being, perhaps, in the greater number of instances, the result, not of ignorance or inadvertence, but of design to place the adversary's case in a disadvantageous position. It appears to me also more equitable; because, if the undertaking be limited to the state of the record when it is made, the defendant knows the price he pays for the boon he asks—both whatever advantage he foregoes, and whatever disadvantage he incurs. Let the amount of either or both, therefore, be ever so great, he cannot complain. But it never can be understood, that when he undertakes, in the words of Lord *Tenterden*, “to bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue,” he undertakes to do this under all the disadvantages, which an astute adversary, by subsequent informality of pleading, may cast upon him. It is well known that the time allowed for pleading is so short, that whenever the facts are at all complicated, or communication must be had with the country for information, or counsel consulted on the proper pleas to be adopted, some allowance being made, as there must in reason be made, for their various engagements, an application for extended time is of absolute necessity. It is made as a matter of course; it argues no default in the defendant, and implies no desire to procrastinate the decision of the suit. Is it, then, reasonable to intend, that, in a case of such constant occurrence, the Judges impose, as a usual term, upon the party an undertaking so understood? A speedy coming to the issue, and a retrenchment of merely formal and dilatory objections, are very important objects; but they would be purchased too dearly if one party were at the same time allowed so to frame his pleadings as to prevent the real merits from

coming in issue, or to compel the other party to try them at a disadvantage. Nor does the qualification suggested, of an application to the Court for leave to demur, appear to me to remove these objections. It must be remembered that another term imposed on the defendant is to rejoin gratis, i. e. within twenty-four hours—a period too short, in the majority of cases, to determine upon and availably make such an application. It is probable that, from the very shortness of the time allowed for consideration, it would be made almost as a matter of course in every case of a replication informally pleaded. If made to the Court, it is attended with considerable expense, and may occasion much delay; if to a Judge at chambers, it requires him to enter more into the merits of the pleadings, and often of the cause itself, upon affidavits, than is at all desirable. I would observe, too, that the plaintiff has the less ground to complain that his replication, if informal, is liable to be demurred to; as it is become now more generally understood than formerly, that the mere statement of a number of facts, all forming one answer, does not fall within the definition of duplicity, and that whenever the plea consists of mere matters of excuse, in whatever form of action, the replication of *de injuriâ* generally is allowable.

I am therefore of opinion, upon the whole, that it is better to abide by the rule laid down in the Common Pleas; according to which the defendant was not, by his undertaking, precluded from demurring specially to the replication; and, consequently, this judgment must be set aside.

Rule absolute.

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JACKSON v. TAYLOR.

Where a ca. sa. without a non omittas clause has been directed to the sheriff, and he has issued his mandate to the bailiff of a liberty in which the defendant resides, and after obtaining time to return the writ, he has returned cepi corpus in due time, the bailiff cannot be compelled to return the mandate, although he has also obtained time to return it.

WIGHTMAN applied for a rule nisi for discharging a rule which had been obtained by the plaintiff in the cause requiring the high bailiff of the liberty of Pickering in Yorkshire to return a mandate of the sheriff to him on a writ of ca. sa. sued out against the defendant. It appeared from the affidavits that when the writ was sued out, it contained no clause of non omittas. The sheriff accordingly directed his mandate to the high bailiff of the liberty of Pickering. The high bailiff obeyed the mandate by arresting the defendant, but there being no gaol within the liberty of Pickering, he caused the defendant to be lodged in the county gaol. The plaintiff contended that by this step the high bailiff had become liable to an action for an escape, and commenced his action accordingly. The plaintiff then took out the usual rules requiring the sheriff to return the writ, and the high bailiff to return the mandate. Before the time for making the return expired, the sheriff and the high bailiff respectively obtained time, the one to return the writ, and the other to return the mandate, until the last day of the term. The sheriff then returned cepi corpus, and the object of the present motion was to discharge the rule calling upon the high bailiff to return the mandate. *Wightman* now contended that the plaintiff had no right to require the mandate to be returned. The sheriff now made his return, that he had taken the body of the defendant, and had it ready. All, therefore, that the plaintiff had a right to have done by the sheriff had been done. The writ of ca. sa. was issued to the sheriff, and the sheriff had obeyed the writ. So far as the plaintiff was concerned, the bailiff was a stranger to the proceeding. Any question which might arise as to the mode in which the defendant came into the sheriff's custody, was a matter entirely between the sheriff and the bail-

iff, in which the plaintiff was not interested. The law on the point was perfectly clear. If a writ was issued to the sheriff without a non omittas clause, and the defendant was resident within a liberty, the sheriff might either issue his mandate to the bailiff of the liberty, or he might enter the liberty himself and take the defendant, if he chose to render himself liable to an action by the bailiff of the liberty. But although he would be liable to an action at the suit of the bailiff, the arrest itself would be perfectly good, and the return of *cepi corpus et paratum habeo* founded on such arrest, would be perfectly good. The practice on this subject as stated by Mr. *Tidd* was quite consistent with the right of the sheriff to enter the liberty, take the defendant, and make the return of *cepi corpus et paratum habeo*, if he thought proper to take the risk of an action being brought against him by the officer of the liberty. Mr. *Tidd* said (a) "if the defendant resides within a liberty, the bailiff of which has the execution and return of writs, it is usual for the sheriff to return that he has made his mandate to the bailiff of the liberty, who has given him no answer, or has returned that the defendant is not found in his bailiwick, or that he has taken the defendant and has him ready. In the first case, the plaintiff is entitled to a non omittas by the statute of Westminster the 2nd, c. 39; in the second, if the return be false, the bailiff is liable to an action, the sheriff not being answerable at common law for the false return of the bailiff. In the last case, the ancient mode of proceeding was by *distringas*; but it seems that the bailiff may now be called upon by rule to bring in the body. If the bailiff make an insufficient return, he is liable to be amerced for it, and not the sheriff, by the statute of the 27 Hen. 8, c. 24, s. 9." This statement of the practice did not interfere with the discretion of the sheriff to enter the

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(a) *Prac.* Vol. 1, p. 309.

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liberty himself, if he chose to run the risk of an action at the suit of the officer of the liberty; or render his return of *cepi corpus et paratum habeo* bad, because he had so exercised his discretion. The bailiff, therefore, was entitled to have the peremptory rule for the return of the mandate discharged.

Knowles shewed cause in the first instance.—He contended, that, after the chief bailiff of the liberty had obtained time to make his return to the mandate, it was too late for him to object to the rule for returning it. The ordinary course was to rule both sheriff and bailiff, and that course had been adopted in the present instance. It was very important that the plaintiff should have a return to the mandate, in order to facilitate the prosecution of his action against the bailiff. In *Boothman v. Earl of Surry* (a), it was held, that the bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an escape if he remove a prisoner taken in execution, to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. In *Hepworth v. Sanderson* (b), the propriety of the practice adopted by the plaintiff in this case was recognised by the Chief Justice of the Common Pleas. Much stress had been laid on the fact of the sheriff returning *cepi corpus et paratum habeo*. But that had nothing to do with this application, because the plaintiff was not proceeding against the sheriff, but against the bailiff. The bailiff had obtained time to return the mandate, thereby acknowledging the propriety of being ruled to return it, and therefore he was not entitled now to object to the rule.

Wightman, in support of the rule, admitted that it might be proper to rule both sheriff and bailiff where no return

(a) 2 T. R. 5.

(b) 8 Bing. 19.

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had been made. But if the sheriff had executed the writ, he was the proper person to proceed against. Supposing the sheriff, instead of returning *cepi corpus et paratum habeo*, had excused himself by the return of *mandavi balivo et nullum dedit responsum*, then it would have been right to rule the bailiff. But now that the sheriff had made his return, for any thing that appeared, the bailiff was a stranger to this proceeding, as no excuse had been made by the sheriff. Then, as to the argument that the bailiff had obtained time to return the mandate, both sheriff and bailiff were originally ruled to make their return. It might have been proper for the plaintiff to rule both, in order to obtain a return from either one or the other; but he had no right to a return from both. Before the sheriff had made his return, the bailiff did not know what that return would be; he did not know that the sheriff would not excuse himself by throwing the blame on him; and therefore, it was necessary that he should obtain time to make his return. He therefore did not know what return to make, until the sheriff had made his. The sheriff had since made his return; and therefore, as in that return no mention was made of the bailiff, he was a stranger to the transaction, and consequently could not be called upon to make a return. Indeed, great inconvenience might arise if the bailiff were now required to make the return to the mandate, he not having been introduced by the sheriff in his return. Under these circumstances, the present rule ought to be made absolute.

COLBRIDGE, J.—This is an application on the part of the chief bailiff of the liberty of Pickering in Yorkshire, to discharge a rule of this Court requiring him to return a mandate which has been issued to him by the sheriff on a writ of *ca. sa.* When this writ was sued out, the plaintiff delivered it in the ordinary way to the sheriff, the defendant being within the liberty of Pickering: he directed his man-

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date to the chief bailiff. The plaintiff took out rules both on the sheriff and chief bailiff, for returning the writ and mandate. Both those officers applied for time to make their returns. Within the time limited by the Court, the sheriff has made his return that he has taken the body of the defendant, and that he remains in custody. The bailiff now applies to have the rule for returning the mandate discharged. The question then is, whether, in consequence of the bailiff having applied for time, he is precluded from making such an application. The only object of the writ of ca. sa. was the production of the body of the debtor, and it is immaterial to the plaintiff whether that is done by the sheriff or the officer of the liberty. As between these two persons, there might be some question as to the franchise. But I do not think that the circumstance of the application for time on the part of the bailiff at all precludes him from now saying, that, as the body has been taken, and is ready in the custody of the sheriff, the plaintiff has obtained all which he had a right to require. I therefore think this rule ought to be made absolute.

Rule absolute.

REX v. Sheriff of HERTFORDSHIRE.

Where a sheriff has applied to the Court under the Interpleader Act, and his rule is discharged, he is entitled to a reasonable time for the return of the writ after the disposal of the rule, before an attachment can issue against him.

TURNER shewed cause against a rule nisi for setting aside an attachment against the sheriff of Hertfordshire for not returning a writ of fi. fa. The writ had been sued out on the 19th of January, and on the 15th of April he was ruled to return the writ. On the 20th, the sheriff obtained from the Court a rule nisi under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, for relief; the assignees of the defendant, who had become a bankrupt, having laid claim to the property seized. On the 7th of May, cause having been shewn against that rule, it was discharged.

On the same day a search was made, and it was ascertained that no return had been made to the writ. The plaintiff accordingly on the 9th of May obtained the present attachment. The application now was to set aside that writ. It was contended by the sheriff, that the adverse proceedings against the sheriff were suspended by the rule under the Interpleader Act; but he might, if he thought proper, have returned the writ.

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COLERIDGE, J.—Would he not have bound himself by returning the writ during the pendency of the Interpleader rule?

Turner.—He has returned nulla bona, but not in time, as that return has been made since the attachment was obtained. After he has made his election to apply under the Interpleader Act to be relieved from his common law responsibility, he is bound by his election. He might, if he had chosen, have returned the writ. If he had not obtained the rule under the Interpleader Act, and had not returned the writ, it was quite clear that he would have been liable to the attachment. The Court had decided that the rule under the Interpleader Act had been improperly obtained; and he could not by such a step therefore place himself in a better situation than that in which he would have been if he had not taken it. In *St. Hanlaire v. Byam (a)*, the process was returnable on the 7th of November, and the time for putting in bail expired on the 11th. On the 10th the defendant obtained a rule nisi to set aside the process with a stay of proceedings, on the ground of misnomer. That rule was discharged, with costs, on the 21st. On the 22nd, an assignment of the bail-bond was taken, and proceedings commenced upon it. On the same day the defendant put in bail. The Court

(a) 4 B. & C. 970.

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held that the defendant had not the whole of the 22nd to put in bail, and that the assignment of the bail-bond and the proceedings under it were regular. There, Mr. Justice *Bayley* said—"It seems to me, that the defendant, whose rule nisi was discharged with costs, ought not to be with respect to time in a better condition by reason of his own rule improperly obtained." If those observations were applied to the present case, it must clearly appear that the sheriff was liable to be attached in consequence of his non-compliance with the rule to return the writ. He also cited *Green v. Glassbrook (a)*.

COLERIDGE, J.—It is very clear, when I look at the particular facts of this case, that the present rule ought to be made absolute. This rule has grown out of an application under the Interpleader Act. It is clear, that, at the time the rule under the Interpleader Act was obtained, no return had been made by the sheriff. The ground of the application was, that two conflicting parties laid claim to the goods seized. What was the sheriff to do? Was he to make a return pending the rule? If he did so, he was doing a thing inconsistent with the application he had made to the Court. That he could not be expected to do. If he could not, he ought to have a reasonable time to make his return to the writ. Now, supposing this were the case of the sheriff of Yorkshire, he must have a reasonable time to make his return: for, supposing the Interpleader rule to be discharged in the morning, would it be reasonable if the attachment were applied for in the afternoon. By coming to the Court under the Interpleader Act, he is not deprived of his right to make what return he chooses, when the Court has decided that he ought to make a return. The sheriff cannot be said to have made any election in this case, because he has merely applied

(a) 1 Scott, 402; 1 Bing. N. C. 516.

under the Interpleader Act to be relieved from the necessity of making any return at all. I think, therefore, that the plaintiff ought not to have issued this attachment. The present rule must, consequently, be made absolute.

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Rule absolute.

DOE d. ROSS v. ROE.

CHANNELL moved for a rule to shew cause for judgment against the casual ejector. The service was on the clerk of the Grand Junction Canal Company, they being the persons in possession of the premises sought to be recovered. The clerk was not resident on the premises, but the service was effected on him on a part of them. He cited *Doe v. Roe* (a), where the service of a declaration in ejectment on the book-keeper of a company in possession of part of the premises was held sufficient. There was no provision in the act of Parliament incorporating the company, which enabled them to sue and be sued in the name of their clerk.

Service of a declaration in ejectment on the clerk of an incorporated company, (not empowered to sue and be sued in the name of their clerk), on a portion of the premises, but who was not resident there, is sufficient for a rule nisi.

COLERIDGE, J.—You may take a rule to shew cause.

Rule nisi granted.

(a) Ante, Vol. 1, p. 23.

INLAND v. BUSHELL.

WHITMORE moved for a rule under the Interpleader Act on the part of the sheriff. A writ of fi. fa. had been

The Court will not interfere to relieve the sheriff under the Interpleader Act

where the proceeds of the levy have been paid over to the execution creditor, although the sheriff may be willing to bring a similar amount into court.

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directed to the sheriff, and a special bailiff appointed by the plaintiff for the execution of the process. A levy was made on the goods of the defendant by the bailiff, and with the authority of the sheriff, the proceeds were paid over to the execution creditor. A claim was now made by the assignees of the defendant on the goods seized under the *fi. fa.* The sheriff was willing to bring the amount levied into Court to abide any order which the Court might think it right to make, under the circumstances, between the contending parties. There was certainly a difficulty in consequence of the money which proceeded from the sale of the goods being paid over to the execution creditor. In *Scott v. Lewis* (a), it was held, that the sheriff cannot apply to the Court under the Interpleader Act, unless the goods or money in dispute are actually in his hands. Here the sheriff was willing to bring the amount into Court.

COLERIDGE, J.—It does not appear to me that there is any longer any contending party with respect to the proceeds of the levy made by the sheriff. It is true that the assignees threaten the sheriff with an action in respect of the sum which he has paid over to the execution creditor; but how will granting a rule under the Interpleader Act relieve him from that action? If the sheriff brings the amount in question into Court, and then the execution creditor is served with the Interpleader rule, he would of course not appear, and then his claim would be barred. But barred as to what? Barred as to the money in Court, and not as to the money already in his hands. I think, therefore, that I cannot interfere by granting a rule under the Interpleader Act.

Rule refused.

(a) 2 C. M. & R. 289.

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DOE *d.* WATTS *v.* ROE.

V. WILLIAMS moved for judgment against the casual ejector. The peculiarity of the case was, that the notice, which was dated the 9th of May, required an appearance "next Easter Term." The literal meaning of that notice would be Easter, 1837. From the date, however, of the notice, the tenant must be aware that he would be required to appear in the following Trinity Term. Under the circumstances, it was submitted that sufficient had been done to entitle the applicant to a rule to shew cause.

Service in ejectment.

COLERIDGE, J.—You may take a rule nisi.

Rule nisi granted.

See White v. Bartholomew. 20. L.J. Exch. 62.

LAWRENCE *v.* MATHEWS.

THIS was an application under the 1st section of the Interpleader Act, 1 & 2 Will. 4, c. 58. It was an action brought against the partners and adventurers in certain mines in the county of Cornwall. The declaration contained a count in trover and a count in case.

The Court has no jurisdiction, under the 1st section of the Interpleader Act, to interfere in an action where the declaration contains a count in case as well as a count in tro-

C. Rowe appeared on the part of the plaintiff, and contended that the present was not a form of action in which the Court could interfere under the statute. The words of the section in question were, that, "in any action of assumpsit, debt, detinue, or trover," the Court might give relief; but here, the declaration being in both case and trover, no jurisdiction was given to the Court to interfere.

COLERIDGE, J.—I have no jurisdiction over the count

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in case ; but I must decide upon the whole matter. Although I have jurisdiction over the count in trover, the count in case prevents me from having jurisdiction over the whole matter. I cannot, therefore, interfere, and the present rule must be discharged.

Rule discharged (a).

Jardine appeared for the defendant in the action.

Montagu Smith appeared for the claimant.

(a) It is also to be observed, above act. See Dowling's Statutes, Vol. 2, p. 570. that the action of *trespass* is also omitted in the 1st section of the

WILKINS v. PARKER.

Where a *capias* has been issued against one defendant, and he is discharged out of custody on account of a defect in the affidavit of debt, without the terms of entering an appearance being stated in the rule, and no appearance is entered by the defendant, the plaintiff has no right to enter one for him.

PLATT shewed cause against a rule obtained by Sir *William Follett* for setting aside an appearance and notice of declaration on the ground of irregularity. It appeared from the affidavits, that the defendant, having been arrested, he applied for his discharge on the ground of a defect in the affidavit of debt. The Court was of opinion that the defect was fatal, and accordingly directed him to be discharged. The rule for his discharge did not contain the term of his entering an appearance, and nothing whatever was said in the rule about an appearance. The plaintiff, however, entered an appearance for him, and, having filed his declaration, gave notice accordingly to the defendant. The irregularity complained of was, that the plaintiff had made such an entry of appearance, nothing having been said about an appearance in the rule for the defendant's discharge. This course, which the plaintiff had adopted, it was now contended was perfectly regular.

By sect. 4 of the Uniformity of Process Act, the plaintiff was allowed in certain cases to serve a copy of the *capias*, instead of arresting the defendant ; and by the 4th warning, directed in the schedule of the act to be subscribed to the writ, an authority was in fact given to enter an appearance, as had been done by the plaintiff in the present case. The language of that warning was, " If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution." In the proceeding of the plaintiff. therefore, he had only availed himself of the rights which the act of Parliament conferred upon him ; for, by sect. 16 of the statute, it was enacted, " that all such proceedings as are mentioned in any writ, notice, or warning issued under this act, shall and may be had and taken in default of a defendant's appearance, or putting in special bail, as the case may be." Under these circumstances, the plaintiff was regular, both in entering the appearance and filing his declaration.

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Sir *W. Follett*, in support of the rule, contended that the Uniformity of Process Act gave no authority to the plaintiff, in such a case as the present, to enter an appearance for the defendant, and therefore the proceedings were irregular. If he had commenced his action by a writ of summons, and had served the defendant with the writ, he might, in default of appearance by the latter, enter an appearance for him. He had not however commenced his action by a writ of summons, but by a writ of *capias*, which could only be used as serviceable process, and conferring on the plaintiff the rights attached to that process, in conformity with the provisions of sect. 4 of the act. The authority to use the *capias* as serviceable process was

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contained in the proviso to that section, the words of which were: "Provided always, that it shall be lawful for the plaintiff or his attorney to order the sheriff, or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others; which order shall be duly obeyed by such sheriff, or other officer or person, and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other." The proviso clearly referred to cases where several defendants were sued, and the plaintiff exercised his discretion in arresting some and serving others. Here, however, there were not several defendants, and therefore the proviso did not apply. The writ of *capias*, consequently, could only be used in conformity with the provisions of the general enacting part of the section. By them it was enacted, "that in all such actions, wherein it shall be intended to arrest and hold any person to special bail who may not be in the custody of the marshal of the marshalsea of the Court of King's Bench, or of the warden of the Fleet prison, the process shall be by writ of *capias*, according to the form contained in the said schedule, and marked number 4." The writ of *capias*, then, only applied to cases where it was intended to hold the defendant to special bail, and could not, therefore, be treated as mere serviceable process. Unless, then, by the terms of the rule discharging the defendant out of custody, it was provided that he should enter a common appearance, or the plaintiff should be at liberty to enter one for him, any appearance entered for the defendant must be irregular. The same observation would apply of course to any proceedings founded on such appearance. The present rule ought, therefore, to be made absolute.

COLERIDGE, J.—I do not think that the plaintiff was at

liberty in this case to enter an appearance for the defendant, he having commenced his proceedings by a writ of *capias*. The proviso in the fourth section clearly refers only to cases where several defendants are sued, and some are arrested and some served. Where a party who is the only defendant has been arrested, and he has been discharged out of custody without the terms of entering an appearance being mentioned in the rule, the plaintiff is not at liberty to enter an appearance for him.

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Rule absolute.

TEULON v. GANT.

WOLLASTON shewed cause against a rule nisi obtained by *Dowling* for rescinding a judge's order, which set aside a judgment of non-pros. It appeared that the defendant had demanded a declaration, on which the plaintiff took out several summonses for time to declare. Two days after the expiration of the last rule for time, the defendant signed judgment of non-pros. A summons having been taken out to set aside this judgment, a learned judge made an order to that effect, on the ground that the last order for time should have been made peremptory, or at least that some notice should have been given, by a fresh demand or otherwise, before the judgment was signed. It was now contended that the judge's order was correct, and 8 Reg. Gen. T. T. 1 Will. 4 (a), was cited, the words of which were, "that no judgment of non-pros shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney, or agent, as the case may be."

Only one demand of declaration is necessary; and therefore, if the plaintiff obtains further time to declare, the defendant will be entitled to sign a non-pros at the expiration of the last order for time.

(a) Ante, Vol. 1, p. 104.

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Dowling, in support of the rule, contended that all the defendant was bound to do, was to make one demand of declaration. All the subsequent delay was at the plaintiff's own instance and for his own benefit, and therefore such delay could not render it necessary for the defendant to make a new demand. If it were so, the plaintiff might, in all instances after a demand of declaration, extend his time for declaring; and then, his extended time having expired, he would still have four additional days to declare in before the defendant could sign a non-pros. With respect to making the order for time peremptory before the non-pros was signed, that was impossible, because the time pursuant to the order had expired before that step was taken by the defendant.

COLERIDGE, J., (after consulting with Master *Goderich*).—I think the judgment was regular. But I think, on payment of costs, the plaintiff may be let in to try, as he makes an affidavit of merits.

Rule discharged accordingly.

SAUNDERS v. DE CHASTELAIN.

Where, after a rule for a *distringas* has been obtained, and before the issue of the writ the defendant admits that he has been served with the summons, an appearance may be entered for him by the plaintiff.

S*TEER* moved for leave to enter an appearance for the defendant, pursuant to the statute 2 Will. 4, c. 39, s. 8. Some difficulty having arisen in serving the defendant personally with the process, an application was made for a *distringas*, and a rule obtained for the issue of the writ. Before, however, it had issued, an application was made on the part of the defendant to settle the action. He then admitted that the writ of summons had been served on him, but ultimately the negotiation went off. The object of the present application was, that the plaintiff

might be allowed to enter an appearance for the defendant.

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COLERIDGE, J.—You may enter an appearance for the defendant.

Rule granted.

DOE *d.* JENKINS *v.* ROE.

CLEASBY moved for judgment against the casual ejector. The affidavit on which the application was founded, stated that the deponent had “delivered the declaration to the wife on the premises,” but did not state that he had “served” the declaration by delivering it to the wife on the premises.

In an affidavit of service of a declaration in ejectment, the word “served,” is not indispensably necessary, if it appears from the affidavit that it has been duly served.

COLERIDGE, J.—That is sufficient.

Rule granted.

PEPPER *v.* YEATMAN.

MANNING moved for a rule to shew cause why the verdict in this case, found for the plaintiff, should not be set aside and a nonsuit entered. It was an action for an attorney’s bill, and was tried before the sheriff. The question was, whether a signed bill ought to have been delivered a month before action brought: the two items which, it was suggested, on the part of the defendant, rendered the bill taxable, and therefore made it incumbent on the plaintiff to deliver a signed bill a month before action brought, pursuant to the 2 Geo. 2, c. 23, were the following:—

The charges in an attorney’s bill for attendances on his client, to advise him on matters subsequent to the conclusion of an action, do not render it necessary that a bill should be delivered a month before action brought.

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“Attending on you and your son several times respecting an action at law which you had tried at Winchester at the last assizes, and wherein a verdict was given against you, and advising you fully respecting a bill of sale given by you to Captain Moore, at Stock, &c., and pressing such bill of sale, when it was determined to apply to Captain Moore to have the same put in force - 13s. 4d.

“Attending on you respecting the sheriff having previously levied a warrant against your property at the suit of the plaintiff in the action against you, although the officer's deputy was not in the actual possession, when Mr. Basket levied under the bill of sale, and for fully advising you thereon - - - - 13s. 4d.

He cited *Smith v. Taylor* (a), where the Court of Common Pleas was of opinion that advice by an attorney to his client, after a writ had been served upon him, was an item which required a bill to be delivered pursuant to the statute. The items in the present case might be considered as coming within the principle of the one cited.

COLERIDGE, J.—The first item shews that the action is at an end, at the time when the attendance for which the charge is made takes place. It is only advice as to a bill of sale, which was required to be put in force. The second item does not at all shew that there was any action in existence at the time when the charge contained in it arose. I will, however, consider the case.

Cur. adv. vult.

COLERIDGE, J.—I have considered this case, and adhere to the opinion I have already expressed.

Rule refused.

(a) 5 M. & P. 66; 7 Bing. 259.

1836.

ROSCOE v. HARDMAN.

HOGGINS moved for a rule to shew cause, why an attorney, whose name he mentioned, should not deliver up certain papers in his possession to his client, or why, in the alternative, an attachment should not issue against him.

The Court will not grant a rule, requiring an attorney to deliver up papers, and in the alternative for an attachment in case of a non-delivery, but each branch must be made the subject of a separate motion.

COLERIDGE, J.—You cannot proceed more than one step at a time. You may have your rule nisi, calling on the attorney to deliver up the papers in question; and if the Court should be of opinion, that that rule ought to be made absolute, and the attorney should disobey that rule, you may then make a separate application for an attachment.

Rule accordingly.

TWISS v. FRY.

BALL moved for an attachment against an attorney for not paying over to his client a certain sum of money, pursuant to his promise contained in a letter which was exhibited in support of the application.

A rule for an attachment against an attorney for non-payment of money pursuant to his promise, cannot be obtained; but a previous rule requiring the payment of the money must have been made absolute.

COLERIDGE, J.—I cannot grant you an attachment at once under these circumstances. You may have a rule to shew cause, why he should not pay over the sum of money in question pursuant to the promise in the letter; and if the Court should make the rule absolute for that purpose, you may then make a separate application for an attachment, should he refuse to obey the rule.

Rule accordingly.

COURT OF EXCHEQUER.

Trinity Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

1836.

REX v. Lord CREWE.

Where a crown debtor has died insolvent a motion for a writ of diem clausit extremum is absolute in the first instance.

MANNING moved for a writ of diem clausit extremum. An extent had issued against certain persons who were indebted to a crown debtor, and on the inquisition under that extent, Lord Crewe was found indebted to them upon a bond. A writ of extent had subsequently issued against him, and he had since died abroad and insolvent.

Lord ABINGER, C. B.—You may take a rule nisi.

Manning submitted that, under the circumstances, it was in the nature of an immediate extent, and was absolute in the first instance (a).

PER CURIAM.—The rule may be absolute in the first instance.

Rule absolute.

(a) See Manning's Ex. Prac. 81. 11.

1836.

OSWALD v. WILLIAMS.

PETERSDORFF shewed cause against a rule obtained by *Humfrey* to discharge the defendant out of custody, on the ground that he had obtained his certificate under a fiat of bankruptcy.

A preliminary objection was taken, that the affidavit upon which the rule was obtained did not state that the certificate had been enrolled; and reference was made to *Jacobs v. Philips* (a). It was urged in answer, that, as the certificate was produced in Court, it was not necessary to shew by affidavit that it had been enrolled. On the suggestion of the Court, the objection was waived on an undertaking to produce the proper affidavit.

Petersdorff then shewed cause on the merits.—The fiat issued in January, 1835, and the present action was brought ten months afterwards. The defendant did not plead his bankruptcy, but agreed to give a cognovit for the payment of the money at a subsequent period, which was three months later than the plaintiff would have been entitled to judgment by the ordinary course of proceedings in the action.

PER CURIAM.—The cognovit does not give the plaintiff a new debt or create a new cause of action, but is merely a confession of the original claim. Suppose the defendant had allowed judgment to go by default, he would be entitled to be discharged, and the cognovit does not place him in a different situation.

Rule absolute.

(a) 1 C. M. & R. 195.

On an application to discharge a defendant out of custody on the ground that he has obtained his certificate under a fiat of bankruptcy, it should appear by affidavit that the certificate has been enrolled.

A bankrupt is entitled to his discharge from prison, notwithstanding he has neglected to plead his bankruptcy, and has given a cognovit payable at a time subsequent to that at which the plaintiff might have obtained judgment.

1836.

In the Matter of the Estate and Effects of IBBERTSON.

Where a copy of a rule nisi for an attachment was delivered to defendant's son, who refused to say where his father was, and an appointment was made for a subsequent day, that was held not sufficient to dispense with personal service.

AMOS moved that a writ of attachment issue in eight days against J. I., executor of W. Ibbertson. A rule nisi had been obtained for an attachment against him, for not accounting for legacy duty, pursuant to a rule for that purpose. There was a difficulty in serving the rule nisi for the attachment; but the affidavit upon which the motion was made, stated that a copy was delivered to the son of J. I., who informed deponent that his father was from home, but declined to say where he was. The deponent then made an appointment to call on a subsequent day, but at that time he was unable to see the executor.

PARKE, B.—That is not sufficient for the Court to grant an attachment. We require a personal service unless there is a very strong case made out that the party keeps out of the way.

Rule refused.

PRICE v. WILLIAMS.

Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the Court will direct the sheriff to summon a jury to be taken from the special jury book.

THIS was a writ of inquiry about to be executed before the sheriff of Carmarthenshire. *Chilton* moved for a rule nisi, directing the sheriff to summon a good jury. He moved upon an affidavit, which stated that the common jurymen of the county were improper persons to assess the damage in a case like the present.

J. Evans shewed cause, and contended that a special jury could not be summoned for assessing the damages upon a writ of inquiry.

PARKE, B.—There can be no objection to directing the

sheriff to summon a jury to be taken from the special jury book.

1836.

PRICE

v.

WILLIAMS.

Lord ABINGER, C. B.—There are many instances of a writ of inquiry before a judge with a special jury.

Rule absolute.

COLE v. BEARDY.

COWLING moved for a rule calling on the plaintiff to shew cause why he should not give security for costs. The affidavit in support of the motion stated that the plaintiff resided at New York.

It is not necessary for a defendant to shew the stage of the proceedings in order to obtain a rule nisi for security for costs.

ALDERSON, B.—Does your affidavit shew in what stage the proceedings are?

Cowling submitted that it was not necessary in the first instance to shew the stage of the proceedings, but that if the application was made too late, it rested with the plaintiff to shew that fact. He referred to *Jones v. Jones (a)*.

ALDERSON, B.—Upon the authority of that case, I think you are entitled to a rule nisi.

Rule accordingly.

(a) 2 C. & J. 207.

LLOYD v. JONES.

JERVIS moved to set aside a copy of a writ of summons, and service thereof, and all the subsequent pro-

A copy of a writ of summons was indorsed "this writ was issued

by W. L., No. 32, Great James St., Bedford Row, agent for the plaintiff in person, who resides at Dartmouth:"—Held insufficient.

1836.

LLOYD

v.

JONES.

ceedings, on the ground that the copy served was not properly indorsed with the residence of the attorney who sued out the writ. The indorsement was as follows: This writ was issued by William Lowden, No. 32, Great James Street, Bedford Row, agent for the plaintiff in person, who resides at Dartmouth. It was submitted that this was not a sufficient compliance with s. 12 of 2 Will. 4, c. 39, which requires that in case no attorney shall be employed, then the writ shall be indorsed with a memorandum, expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, with street and number of the house of such plaintiff's residence, if any such there be.

Sir *G. Lewis* shewed cause, and contended that as the agent's residence was stated, that would answer the purpose required by the act.

PER CURIAM.—Even if there had been an indorsement of the plaintiff's residence, it would not have been sufficient, as the agent's residence is incorrectly stated.

Rule absolute.

STUBBS v. LAINSON and SALOMONS, Esqrs.

In an action against the sheriff for a false return, the declaration alleged that the *sheriff seized and took in execution and levied* certain goods. Plea that he did not seize and take in execution and levy:—Held, on special demurrer, that the traverse should have been in the disjunctive.

THIS was an action against the defendants as sheriff of Middlesex for a false return of nulla bona. The declaration was in the usual form, and proceeded to state that the defendants, within their bailiwick as such sheriff, seized and took in execution divers goods and chattels of G. A., of great value, to wit, of the value of the monies so indorsed on the writ, and directed to be levied as afore-

—Held, on special demurrer, that the traverse should have been in the disjunctive.

said, and then levied the same thereout. Plea, that defendants did not, by virtue of the said writ as such sheriff as aforesaid, *seize and take in execution* any goods or chattels of the said G. A., *and levy* the monies so indorsed and directed to be levied by the said writ modo et forma. Special demurrer assigning for cause that the plea traversed the allegation in the conjunctive, which might have been supported by proof in the disjunctive, the effect of the traverse being to impose upon the plaintiff more extensive proof than is by law essential to support his case.

1836.

STUBBS
v.
LAINSON.

Miller, in support of the demurrer, referred to *Goram v. Sweeting* (a), and to the authorities there collected. The general rule was that in an action for damages, the defendant shall not be permitted, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do if the defendant had pleaded the general issue only to the declaration. Where to an action on an attorney's bill, the defendant pleaded that the bill was for work at law and in equity, and was not delivered a month before action brought, and the plaintiff replied that the bill was not for work at law *and* in equity, the replication was held ill, since there would have been an answer to the action, if the claim were for charges either at law or in equity (b).

James, in support of the plea.—The traverse is not too large: the plaintiff in order to support his case must prove that the sheriff both seized and took in execution and levied. The mere seizure would not render the sheriff liable, for there might have been a claim by the landlord for a year's rent, but the plaintiff should also prove a levy. The seizure and levy in fact constitute but one entire pro-

(a) 2 Wms. Saund. 206.

(b) *Moore v. Balcott*, Ante, vol. 3, p. 145; 1 Scott, 122.

1836.

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position, and therefore they may both be put in issue. *O'Brien v. Saxon (a)*, *Robinson v. Rayley (b)*.

PER CURIAM.—It would be sufficient for the plaintiff in the first instance to shew that the sheriff had seized the goods; that would *prima facie* make him liable: consequently, the plea is bad, since it compels the plaintiff to go into further proof than is essential to support his case.

Amendment on payment of costs.

(a) 2 B. & C. 908; 4 D. & R. 579.

(b) 1 Bur. 316.

PULLEN v. SEYMOUR.

Where the declaration on a bill of exchange omitted the time at which the bill was payable, and the Judge at *Nisi Prius* refused an amendment, and nonsuited the plaintiff, the court set aside the nonsuit on terms.

THIS was an action by indorsee against acceptor of a bill of exchange. The declaration stated that one J. S. &c. made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said J. S. or order 60*l.*, which period is now elapsed: omitting the words "three months after the date thereof," at which time it appeared the bill was payable. At the trial of the cause before *Gurney, B.*, at the sittings in last Easter term, the learned Judge refused the application of the plaintiff's counsel to amend, and directed a nonsuit. *Humfrey* having obtained a rule nisi to set aside the nonsuit, and for a new trial—

Steer shewed cause, and contended that it was entirely in the discretion of the judge at *Nisi Prius* whether or no he would allow the amendment, and that it was not competent for the Court to revise his discretion. *Parks v. Edge (a)*, *Doe v. Errington (b)*.

(a) 1 C. & M. 429.

(b) 1 A. & E. 750; 3 Nev. & M. 646.

PARKER, B.—I think the nonsuit should be set aside upon payment of costs, and the plaintiff be at liberty to amend and the defendant to plead de novo.

1836.
PULLEN
v.
SEYMOUR.

Rule accordingly.

ATTORNEY-GENERAL v. PARSONS.

THIS was an information of intrusion for encroachments on certain crown lands in the county of Radnor. The Attorney-General prayed that the inquisition might be taken in the county of Hereford, and not in the county of Radnor, where the venue was laid: his affidavit stated that there were not forty-eight persons qualified to be special jurymen in the county of Radnor, and that a fair trial could not be had there. In *Rex v. Webb* (a), it was held the King might choose his county, and might waive that which he had seemed to have elected before. So, in *Com. Dig., tit. Prerogative*, it was laid down the King by his prerogative may sue in what court he pleases.

In an information of intrusion the Crown may of right change the venue, or have the inquisition in a different county from that in which the venue is laid.

PARKER, B.—There is no doubt of the prerogative of the Crown in all personal matters; but you should inquire whether there is any case in which it has been held the King has the same power in real actions; because, if there is no instance, you had better take a rule nisi.

The *Attorney-General*, on a subsequent day, cited *Manning's Ex. Prac.* 197, which states the King, in an information of intrusion, may lay his venue in any county without regard to the local situation of the premises (b). In the present case, however, the application was not to change the venue, but that the inquisition might be taken in the

(a) *Ventris*, 17.

(b) *Lyster* dem. *Easton v. Edwards*, Sar. 10.

1836.
 ———
 ATT-GEN.
 v.
 PARSONS.

county of Hereford; and he had been unable to find any instance of an information of intrusion being tried in a different county from that in which the premises were situated.

Lord ABINGER, C. B.—The Crown has a right to lay the venue in any county; or, when laid in a particular county, to change it, or to have the inquisition in any other county.

BOLLAND and ALDERSON, Bs., concurred.

Prayer granted.

HEATH v. FREELAND.

The value of materials cannot be recovered under a count for work and labour only.

DEBT.—The declaration stated the defendant to be indebted to the plaintiff in 10*l.* for work and labour, and in 10*l.* for money due on an account stated. Plea, to the whole demand, except as to the sum of 7*l.*, parcel thereof, *nunquam indebitatus*. To the 7*l.* there was nothing pleaded. The plaintiff by his particulars claimed 12*l.* 9*s.* 8*d.* : 8*l.* of which was for work and labour, and the remainder for materials. The cause was tried before the Under-sheriff of Sussex, when the jury found a verdict for the plaintiff for 4*l.* 4*s.* 10*d.*

Gale having obtained a rule nisi to set aside the verdict and enter a nonsuit, on the ground that the materials could not be recovered under a count for work and labour, *Cotterell v. Apsey* (a),

G. T. White shewed cause, and contended, that, as the defendant had suffered judgment by default as to 7*l.*, the

(a) 6 Taunt. 322.

plaintiff might apply that sum to the account stated, and then the damages recovered might be ascribed to the count for work and labour.

1836.
HEATH
v.
FREELAND.

PER CURIAM.—The meaning of the plea is, that the defendant was not indebted in more than 7*l.* for work and labour, or on an account stated. There is no authority produced to the Court, that, under a count for work and labour, materials may be recovered, but there is a direct authority against it. The rule must therefore be absolute.

Rule absolute for a nonsuit, with liberty to amend on payment of costs.

— GRIFFITHS v. JONES.

CASE for injury to the plaintiff's reversionary interest in a wharf, by breaking a wall. The defendant pleaded to the whole declaration not guilty, and a special plea of justification. The plaintiff then new assigned excess, upon which the defendant withdrew his plea of not guilty, and paid 10*s.* into Court upon the new assignment, which sum the plaintiff accepted in satisfaction. On taxation, the Master allowed the plaintiff the costs of the writ, but considered the defendant entitled to all the other costs prior to the new assignment. A rule nisi having been obtained by *Jervis*, for the Master to review his taxation, on the ground that, as the plaintiff had succeeded, he was entitled to the general costs of the cause,

Where a defendant pleads a special plea only, and the plaintiff new assigns, and the defendant pays money into Court upon the new assignment, the plaintiff is entitled to the costs of the writ, and the defendant to the costs of all the other proceedings prior to the new assignment.

Sir *W. Follett* shewed cause.—The defendant has adopted the course recommended in *Williams's Saunders* (a), and has relinquished the general issue. He has,

(a) Vol. 1, p. 300 a, n. (f).

1836.
 —————
 GRIFFITHS
 v.
 JONES.

in fact, succeeded on the plea of justification, and is therefore entitled to the general costs prior to the new assignment. The plaintiff would only be entitled to those costs, if the general issue remained upon the record, for then he would be compelled to go to trial upon that plea, notwithstanding he accepted the money paid into Court upon the new assignment. *Booth v. Ibbotson* (a), *House v. The Thames Commissioners* (b). The case of *Ruddock v. Smith* (c) is similar to the present; and there, the Court say, "that, as the general issue was withdrawn, and the plaintiff had entered a nolle prosequi as to his declaration covered by the special plea, and the defendant having suffered judgment by default as to the new assignment, the only question upon the record which was to be tried between the parties was the amount of damages to which the plaintiff was entitled on the execution of the writ of inquiry, and that there was no pretence for making the defendant pay more than the amount of costs incurred in the execution of that writ."

Jervis, in support of the rule, contended that the plaintiff, at all events, was entitled to the costs of so much of the declaration as supported the new assignment.

LORD ABINGER, C. B.—The point to be considered is, whether the payment of 10s. into Court, and the acceptance of it in satisfaction, is not equivalent, with respect to costs, to letting judgment go by default, and the finding of 10s. damages upon a writ of inquiry: the two cases seem to me to stand upon the same footing. The general principle is, that the plaintiff is entitled to the costs of the writ, and the defendant to those of the subsequent proceedings.

ALDERSON, B.—The true test is, whether the new as-

(a) 1 Y. & J. 354. (b) 3 B. & B. 117. (c) Ante, Vol. 1, p. 467.

assignment forms the real subject-matter complained of. The plaintiff is entitled to the costs of the writ, and, strictly speaking, he ought to have a portion of the declaration; but the practice has only been to allow him the new assignment.

GURNEY, B., concurred.

Rule discharged.

1836.
GRIFFITHS
vs
JONES.

PEEL v. WARD.

PETERSDORFF moved to set aside the issue in this case, the notice of trial, and the judge's order to try before the sheriff, on the ground that the issue was improperly drawn up. The action was brought for a sum under 20*l.*, and a judge's order had been obtained to try the cause before the sheriff, pursuant to the 17th sect. of the 3 & 4 Will. 4, c. 42. The objection was, that the issue was not drawn up according to the form given by R. H. T. 4 Will. 4, No. 4 (a), but after stating the pleadings, it concluded in the usual form of an issue at *Nisi Prius*.

Where a cause is directed to be tried before the sheriff, the issue must be framed according to the form given by R. H. T. 4 Will. 4, No. 4, and if the issue has been made up and delivered before the order for trial, an order should be obtained for its amendment.

Busby shewed cause, and contended that there was nothing to prevent the plaintiff delivering the issue before he obtained the judge's order for the trial before the sheriff; and if so, the issue was regular at the time it was delivered, and could not be made irregular by any subsequent proceeding.

Lord ABINGER, C. B.—It is quite clear that, in all cases of trial before the sheriff, the issue should be made up for that purpose according to the form given by R. H. T. 4 Will. 4, No. 4. As the issue was delivered before the judge's order to try before the sheriff, the plaintiff ought to have obtained an order to amend the issue. The deli-

(a) Ante, vol. 2, p. 329.

1836.

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very of the issue cannot do away with a form which is expressly required by rule of court.

Rule absolute.

TURNER v. BARNARD.

Defendant is not precluded from the benefit of the Court of Request Acts, by paying money into Court, or by consenting to a trial before the sheriff.

ASSUMPSIT for money paid, and money due on an account stated.—Plea, to the first count, payment of 3*l.* 10*s.* into court; to the residue of the declaration *non assumpsit*. Replication, that plaintiff had sustained damage to a greater amount than the sum paid into court. The cause was tried before the under-sheriff of Warwick, and a verdict was found for the plaintiff with 4*l.* 10*s.* damages. A rule having been obtained by *Erle* calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion to deprive the plaintiff of his costs under the 47 Geo. 3, st. 1, c. 14, (the Birmingham Court of Request Act),

F. Kelly shewed cause.—The Court of Conscience Acts do not apply to cases in which there has been a plea of payment of money into court. The defendant by his own act has made himself liable to pay certain costs. The rules of 4 H. T. 4 Will. 4 (a), which give the forms when money is paid into court, provide that “after the delivery of a plea of payment of money into court, the plaintiff shall be at liberty to reply to the same, by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed.” If then the plaintiff, instead of replying that he had sustained further damage, had accepted the 3*l.* 10*s.*, he would, un-

der provision of that rule, have been entitled to those costs. He ought not therefore to be in a worse situation because he has proceeded to trial, and has proved the plea to be false [Lord *Abinger*, C. B.—If you bring an action against a party he is at liberty to make all the defences he can; there is nothing to prevent the defendant taking advantage of this Court of Request Act]. It is impossible to comply with provisions of both statutes, and therefore the last must prevail. Where a party is arrested for a larger sum than there is due, it has been held that the 43 Geo. 3, c. 46, s. 3, does not apply to cases where the defendant pays money into court. *Rowe v. Rhodes* (a). [Lord *Abinger*, C. B.—There may be a good reason for not interfering under 43 Geo. 3, because the defendant may have a remedy by action, but unless by act of Parliament, we cannot prevent a defendant from pleading what he pleases]. Another ground of objection is, that the cause was tried before the under-sheriff, under an order made by consent of the parties; since therefore the defendant has himself consented to this mode of trial, he cannot now say the trial ought to have taken place in another way.

LORD ABINGER, C. B.—Neither ground of objection is sufficient to deprive the defendant of the benefit of the act: neither the practice of this court, nor the act of Parliament under which the form of the plea of payment is prescribed, affect the Court of Request Acts.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

(a) 2 C. & M. 379.

1836.
TURNER
v.
BARNARD.

1836.

On a scire fieri inquiry, the judgment against the executors on a false plea is sufficient evidence of a devastavit.

PALMER v. WALLER and MANTON, Executors of WALLER.

JERVIS moved for a rule to shew cause why the sheriff's return to a scire fieri inquiry should not be quashed, and why a new inquisition should not be taken. The action was brought on a promissory note made by the testator, and the defendants pleaded that the testator did not make the note; that he made it for the accommodation of the plaintiff, and without consideration; and also that he had paid it. A verdict was found for the plaintiff on all these issues. A writ of scire facias de bonis testatoris was thereupon sued out, to which the sheriff returned nulla bona. The plaintiff then proceeded by a scire fieri inquiry, to which the sheriff returned that the defendants had no goods of the testator to be administered in his bailiwick. It was submitted that the sheriff's return was improper, since the fact of the defendant's having pleaded several pleas which they must have known to be false, was sufficient evidence of a devastavit. *Erving v. Peters*(a).

B. Andrews shewed cause, and contended that the circumstance of the defendants having had a verdict against them on the issues raised was not sufficient evidence of a devastavit, since they might have had assets at the time of action brought so as to preclude them from pleading plene administravit. In *Erving v. Peters*, the sheriff had returned a devastavit, and therefore that case was different from the present, it being an inquiry as to whether the defendants had been guilty of a devastavit, and some direct evidence of that fact should have been given.

PER CURIAM.—There was sufficient evidence for the jury to have found a devastavit. The recovery of the

(a) 3 T. R. 685.

judgment shows that the defendants had assets at the time of action brought, which they have not accounted for.

1836.

PALMER

v.

WALLER.

Rule absolute.

SHELFORD v. O'BRIEN.

JERVIS moved for a rule to shew cause why the bail-bond given in this case should not be delivered up to be cancelled, on the ground of the insufficiency of the affidavit to hold to bail, which was as follows:—"N. T. Smith, of &c., ship broker and agent for J. S. & L. D., of &c., owners of the ship called the City of Edinburgh, of the port of London, maketh oath and saith, that E. O'Brien is justly and truly indebted unto the said J. S. & L. D. in the sum of 40*l.*, for the hire of a certain berth on board the said ship, let by the said J. S. & L. D. to the said E. O'Brien, and at his request." The objection was, that it did not appear that he had used the berth.

An affidavit that defendant was indebted for "the hire of a berth on board a ship," held sufficient, and that it was not necessary to shew an actual enjoyment.

R. Alexander shewed cause, and referred to *Brown v. Garnier* (a), where it was held sufficient to state the defendant was indebted for the hire of divers carriages of the deponent, hired to and for the use of the defendant.

Jervis, in support of the rule, contended that the affidavit ought to have shewn an actual enjoyment of the berth. The usual form was that the defendant was indebted for the passage in and on board of a certain ship or vessel of the deponent, from — to —. The words "passage in and on board of" clearly shewed an enjoyment.

(a) 6 Taunt. 389.

1836.
 SHELFORD
 v.
 O'BRIEN.

PARKE, B.—When this case was before me at chambers, I thought *Brown v. Garnier* an authority for holding this affidavit sufficient. I am still of opinion that it is a proper affidavit, and that perjury might be assigned upon it. It shews the defendant was indebted for the hire of a berth, and it will be found in all those cases in which it has been held that the word “indebted” was not enough to shew a cause of action, that they are instances in which there might be a debt due in presenti, solvendum in futuro.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Rule discharged.

GREEN v. SMITH.

It is no ground of error coram vobis that the writs of venire facias and distringas juratores are returned with only one panel annexed to both.

ERROR coram vobis.—The error assigned was as follows:—That although a writ of venire facias juratores was sued out in this action by and on behalf of the said W. W. Smith, to wit, on &c., and the same was then delivered to the sheriff of Middlesex to be executed; and although a writ of distringas juratores was sued out in this action by and on behalf of the said W. W. Smith, to wit, on &c., and the same was then delivered to the said sheriff of Middlesex to be executed; and although the said sheriff in and upon the said writ of venire facias juratores then made a certain indorsement in the words following, viz., the execution of this writ appears by the panel annexed; and although the said sheriff upon the said writ of distringas juratores then made a certain other indorsement in the words following, viz., the execution of this writ appears by the panel annexed, yet in fact there is but one panel, and there never has been more than one panel, and not two panels, one annexed to each of the said writs, as by law there ought to be; and therefore in this there is manifest error.

1836.

GREEN
v.
SMITH.

Sir *W. Follett*, for the plaintiff in error.—In the case of *Rogers v. Smith* (a), all the authorities on this subject are collected, and the question is whether, in the present case, there is any return to the *distringas*, or any panel annexed. The 3 Geo. 2, c. 25, s. 8, clearly required that a panel should be annexed both to the *venire* and the *distringas*; and the 6 Geo. 4, c. 50, s. 15, enacts, that every sheriff shall, upon his return of every writ of *venire facias*, annex a panel containing the names, places of abode, and addition of the jurors, and it provides that it shall not be requisite to insert in the *distringas*, subsequent to the writ of *venire facias*, the names of all the jurors contained in the panel, but it shall be sufficient to insert in the mandatory part of such writs respectively the “bodies of the several persons in the panel to this writ annexed named,” or words of the like import; and to annex to such writs respectively panels containing the same names as were returned in the panel to such *venire facias*. It is evident, therefore, that there should be a distinct panel annexed to each writ.

Halcombe, for the defendant in error, was stopped by the Court.

Lord ABINGER, C. B.—If there had been no panel at all annexed, that would have been ground of error; but the question here is, whether it is necessary for the sheriff to have two distinct panels annexed to the two writs. I am of opinion that he may annex the same panel to both writs.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Judgment affirmed.

(a) 1 Adol. & E. 776; 3 Nev. & M. 760.

1836.

In debt for goods sold, defendant pleaded as to parcel, that the sum was the residue of a larger sum agreed to be paid for a boat warranted by the plaintiff; that the boat was unsound, and only worth a certain sum, which had been paid to plaintiff at the time of the sale:—
Held, that the plea amounted to the general issue.

DICKEN v. NEALE.

DEBT.—The declaration stated the defendant to be indebted to the plaintiff in 20*l.*, for the price and value of a boat bargained and sold, and in 20*l.* for a boat sold and delivered; there was also a count on an account stated. The defendant pleaded to the whole declaration *nunquam indebitatus*; and for a further plea as to the sum of 17*l.* 10*s.*, parcel of the said sum of 20*l.* in the said second count mentioned, that the action was brought by the plaintiff against the defendant for the recovery of the sum of 17*l.* 10*s.*, being the residue of 57*l.* 10*s.*, the same being the price of a boat sold and delivered by the plaintiff to the defendant; that at the time of the sale of the said boat the plaintiff warranted the same to be sound and fit for reasonable use; that the defendant, confiding in the said promise of the plaintiff, did buy the said boat upon the terms aforesaid, and did then pay to the plaintiff divers sums of money, amounting to the sum of 40*l.*; that the said boat was not sound or fit for reasonable use, but on the contrary thereof was unsound and unfit for use; by reason whereof the said boat became and was of little or no value to the defendant, and that the same was not worth more than 40*l.* which was the reasonable price and value thereof, and that the defendant had incurred great expense in putting the boat in a sound state, and making it fit for reasonable use. Demurrer, assigning for cause that the plea did not confess and avoid the action, but that it amounted to the general issue.

Ogle, in support of the demurrer.—In order to recover, the plaintiff would be bound to prove the sale and delivery of the boat, and that it was worth 57*l.* 10*s.* The plea discloses facts which shew the plaintiff never could recover on the special contract, but only on a quantum

meruit, consequently, the general issue is the proper plea. In *Cousins v. Paddon* (a), it was held, that in an action for goods sold and delivered, the defendant might prove under the general issue that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price. The plaintiff then can only recover on the quantum meruit, and this plea shews that the value of the boat has been paid.

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NEALE.

Archbold, in support of the plea, contended, that the plea of *nunquam indebitatus* denied that there ever was such a contract as that declared upon: the defendant could not, therefore, under that plea, shew a state of facts which admitted a contract and avoided it by subsequent matter.

LORD ABINGER, C. B.—It appears from the plea that the defendant paid to the plaintiff 40*l.*, the value of the boat, at the time he purchased it. He then never was indebted to the plaintiff. The plea is therefore bad, as amounting to the general issue.

BOLLAND and GURNEY, Bs., concurred (b).

Judgment for the plaintiff.

(a) Ante, Vol. 4, p. 488; S. C. 2 C. M. & R. 547.

(b) *Parke*, B., was absent.

1836.

WATKINS v. O'GORMAN MAHON.

Where a party consents to a judge's order for a reference to the Master, and undertakes to pay the sum found due, he cannot afterwards dispute the amount for which the Master has given his allocatur.

THIS was an action brought by the plaintiff to recover a bill of costs incurred in defending an action, as an attorney, for the defendant. The plaintiff had arrested the defendant for 200*l*. A summons was thereupon taken out before Mr. Justice *Patteson*, to stay proceedings on payment of debt and costs; and the learned Judge, by consent of the parties, ordered "that the plaintiff be at liberty to sign final judgment, that the bill of costs be referred to the Master to be taxed, and upon the payment of what should be found to be due, together with costs of the action, all proceedings to be stayed; but in default of payment, the plaintiff to be at liberty to issue execution for the sum named in the Master's allocatur." The amount of the bill of costs was 487*l*. 19*s*. 2*d*., and credit was given for 232*l*. 10*s*., leaving a balance due of 225*l*. 9*s*. 2*d*. On taxation, the Master deducted 106*l*. 16*s*. 8*d*. A rule having been obtained by *Maule* for setting aside so much of the order of Mr. Justice *Patteson* as related to the payment of the costs of the action, and for allowing the defendant the costs of the action, under the 43 Geo. 4, c. 46, s. 3, and also the costs of taxation—

Jervis shewed cause.—The statute 43 Geo. 3, c. 46, s. 3, only applies to cases in which there is a recovery by verdict. If a cause is referred to an arbitrator, it is not within the statute, without the reference is under an order of *Nisi Prius*, in which case the finding of the arbitrator is the same as the verdict of a jury (*a*). Besides, the defendant has consented to the reference under the 2 Geo. 2, c. 23, s. 23, and has submitted to pay the whole sum that should be found due. Though it was formerly considered

(*a*) Per *Bayley, J.*, *Roe v. Rhodes*, 2 C. & M. 381. See *Jones v. Jehu*, ante, p. 130.

that the Court had a general power of referring an attorney's bill for taxation independently of the statute (a), yet in a late case where an attorney sued for the amount of his bill, which did not contain any item taxable by the statute, the Court, after conference with the other Judges, refused to interfere (b).

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PARKE, B.—Supposing the Court has the power to interfere, it is now too late to make this application. The defendant should have taken his stand before the reference to the Master.

ALDERSON, B.—A party is not allowed to dispute the amount found due, if he goes before a judge and consents to the reference. If he wished hereafter to dispute the claim, he should have made a condition that he should not only have the bill taxed, but should also be allowed to dispute the amount for which the Master might give his allocatur.

Rule discharged (c).

(a) *Wilson v. Gutridge*, 3 B. & C. 157. p. 95.

(b) *Dagley v. Kentish*, ante, Vol. 1, p. 330; 2 B. & Adol. 411. See *Doe d. Palmer v. Roe*, ante, Vol. 4, (c) Cause was also shewn upon affidavits, by which it appeared there was a reasonable and probable cause for the arrest.

MASON v. SMITH.

GODSON moved for a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex upon entering a common appearance. The plaintiffs, who were assignees of J. S., a bankrupt, had arrested the defendant for 279*l.* 13*s.* 4*d.*, upon an affidavit alleging him to be indebted to them in that sum, for goods sold by the said J. S. before he became bankrupt, as it appears by the books and papers of the

The Court will not set aside an arrest upon the merits, unless it clearly appears that the process of the Court has been abused.

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v.
SMITH.

said J. S. The defendant resided at Brussels, where goods had been consigned to him by the bankrupt in the year 1831. The affidavit in support of the motion stated that nothing was due to the bankrupt, and set out several letters received by the defendant from the bankrupt in the years 1832 and 1833, by which it appeared that the bankrupt had omitted to give credit for the sums which he had received from the defendant, and had made fictitious entries in his books. The affidavit also stated that the bankrupt was indebted to the defendant, and that the plaintiffs had arrested him, not for the purpose of recovering the debt, but to induce him to disclose some facts respecting the affairs of the bankrupt.

R. V. Richards shewed cause, and contended that, upon the facts disclosed, the Court would not try the question as to whether or not the defendant was indebted to the bankrupt. In order to induce the Court to interfere, it must be clearly shewn that the arrest was groundless. *Burton v. Haworth* (a), *Nixetich v. Bonacich* (b).

Godson, in support of the rule, referred to *M'Ginnis v. M'Curling* (c), and *Burton v. Haworth* (d).

PARKE, B.—It is only in extreme cases that the Court can interfere. You ought clearly to show that the process of the Court has been abused.

ALDERSON, B.—*Nixetich v. Bonacich* is an extreme case. Here, the plaintiffs swear to the best of their belief, which is all they can do as assignees.

Rule discharged.

(a) 4 B. & Adol. 462.

(b) 5 B. & A. 904.

(c) 6 D. & R. 24.

(d) 1 N. & M. 318.

COURT OF COMMON PLEAS.

Trinity Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

NORTON v. LAMB.

1836.

BAYLEY, on the part of the plaintiff, obtained a rule nisi for a commission to examine a witness named Mansell, now residing in Dublin, who was sworn in the usual form to be a material and necessary witness for the plaintiff.

The Court granted a commission for the examination of a witness in an action for criminal conversation with the plaintiff's wife.

Sir *John Campbell*, A. G., shewed cause.—This is an application to the discretion of the Court: and the question is, whether, in a case of this description (an action for criminal conversation with the plaintiff's wife), the Court will permit a witness whose evidence is important and necessary to substantiate the charge to be withdrawn from the jury, upon an affidavit entirely denuded of any facts to shew that the presence of the witness cannot be procured. By the 45 Geo. 3, c. 92, s. 3, power is given to subpoena witnesses in *criminal* cases, in any part of the kingdom. That provision undoubtedly has no application to civil suits: but it may afford a convenient guide to the Court's discretion in the construction of the 1 Will. 4, c. 22. The affidavit should at least shew some endeavours to procure the personal attendance of the witness; it being of infinite importance in a case of this description that the witnesses should be subjected to examination and cross-examination in open court, and that the jury should have the opportunity of judging from their demeanour the

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degree of credit to which their evidence may be entitled : whereas here, it does not appear that any application has been made to the witness to attend the trial ; nor does the affidavit negative the fact of the party's being in London at the commencement of the action, or state when he left this country.

Bayley, in support of the rule, was stopped by the Court.

TINDAL, C. J.—The affidavit upon which this motion is made is framed in the usual manner ; and I do not see how we can lay down in this case, which is a civil action, a rule different from that which obtains in all other actions, though in its aspect this certainly is a matter involving a charge somewhat approximating to a criminal character. If the proposed witness should before the trial come within the jurisdiction of the Court, the examination under his commission will not be evidence.

PARK, J.—Applications under this statute are usually made at chambers : they are of almost daily occurrence ; and I never yet saw an affidavit containing that which the Attorney-General suggests. By the law of England, this is an action of a merely civil nature, and to be governed by the same rules as any other civil action.

GASELEE, J., concurred.

VAUGHAN, J.—The act in question was passed to remedy the difficulty that had before been found to exist where witnesses were out of the jurisdiction of the Courts at Westminster, and consequently could not be subpoenaed. I am of opinion that the affidavit upon which this motion is founded is sufficient to entitle the plaintiff to make his rule absolute.

Rule absolute.

1836.

BOWER v. HILL and Another.

CASE for the obstruction of the plaintiff's right of way. In the first count of the declaration, the right claimed was a public one: in the second, the plaintiff alleged that he was possessed of a certain close of land with the appurtenances, situate in the county of Warwick, and, by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have a certain way from the said close of the plaintiff unto and along a certain stream or watercourse in the county aforesaid, unto and into a certain navigable river called the river Nene, in the county aforesaid, and so back again from the same river unto and along the said stream or watercourse, and from thence unto the said last-mentioned close of the plaintiff, for himself and his servants to go, return, pass, and repass in boats every year and at all times of the year at his and their free will and pleasure; and that the defendants wrongfully and injuriously obstructed the way, &c.

At the first trial, before *Taunton, J.*, at the Northampton Summer Assizes, 1834, the jury negatived the right of way claimed in the first count, and affirmed that claimed in the second count, but added "that the passage was before the building of the bridge and tunnel (the obstruction complained of) by the defendants obstructed by the mud, so that the plaintiff could not have the use of it;" whereupon a verdict was, under the direction of the learned Judge, entered for the defendants. This verdict was afterwards set aside by the Court, and a new trial granted *on the issue on the second count only*, unless the defendants would consent to a verdict being entered for the plaintiff with nominal damages.

On the second trial, before *Littledale, J.*, at the Northampton Spring Assizes, 1835, it appeared that the close in respect of which the plaintiff claimed the right of way

The 64th section of the first rule of H. T. 2 Will. 4, applies only to cases where a new trial is granted upon the whole record.

On the trial of a right of way, in one count claimed as a public, and in another as a private, way, a general verdict was found for the defendants. The Court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count. In the rule no mention was made of costs, nor any reservation of the defendants' verdict on the first count:—Held, that the defendants were nevertheless entitled to the costs of the issues found for them on the first trial and not in contest on the second.

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had originally formed part of the King's Head yard, and abutted on the stream or watercourse in question ; that, whilst the King's Head Inn and yard were in the occupation of the same person as one entire subject, boats and barges for a great many years had been in the habit of going up the stream for various purposes, to carry coals, fish, &c., for the use of the house, corn for the purpose of being deposited in the granaries in the yard, and bricks and other materials for the repair of the house ; and that, about five years before the commencement of the action, the occupier of the King's Head Inn had separated that part of the yard in which the inn stood from the part that abutted upon the stream, which latter portion of the premises are now held by the plaintiff. The evidence of user in the manner above stated was brought down to within about sixteen years. The learned Judge nonsuited the plaintiff on two grounds—first, that the right claimed was not proved, there being no evidence that any hired servant of the plaintiff had ever taken a boat or barge of the plaintiff's up the stream—secondly, that the right of way disclosed by the evidence belonged to the King's Head Inn and yard, as one entire subject, and not merely to the frontage occupied by the plaintiff.

On the taxation of costs, the defendants claimed to be entitled to the entire costs of both trials, and of the motions. It was objected on the part of the plaintiff, that, inasmuch as the rule directing the second trial was silent as to costs, the defendants, though successful on the second trial, were, by the first rule of Hilary Term, 2 Will. 4, s. 64 (*a*), deprived of the costs of the first. It was contended, on the other hand, that the case did not fall within the rule above mentioned, the plaintiff not having in fact succeeded in obtaining a new trial generally, but only a new trial upon one issue, upon which issue he was nonsuited on the second trial.

(*a*) Apte, vol. 1, p. 191.

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The prothonotary having allowed the defendants the costs of the issues that were found for them on the first trial, and upon which the plaintiff failed to obtain a new trial, and also their costs of opposing the first rule; and disallowed the costs of the issue on the second count, upon which the plaintiff succeeded in obtaining a new trial—

Adams, Serjeant, on a former day, obtained a rule nisi for a review of the taxation. He submitted, upon the construction of the rule of Hilary Term, that the defendants were entitled only to the costs of the second trial.

M. D. Hill shewed cause.—At the first trial, the public right claimed in the first count of the declaration was negatived by the finding of the jury. The new trial was granted only upon the private right claimed in the second count. The Court never intended, nor had they under the circumstances the power, to deprive the defendants of the verdict they had obtained upon the other issue. The defendants are clearly entitled to the costs of the issue upon which they succeeded at the first trial, and the finding upon which was not questioned by the Court on granting the rule for the new trial. The rule of Hilary Term, 2 Will. 4, therefore, has no bearing whatever on the case.

Adams, Serjeant, in support of the rule.—The language of the 64th rule is plain and intelligible, and the interests of justice will be best consulted by a rigid adherence to it. [*Tindal*, C. J.—It certainly was not the intention of the Court to deprive the defendants of their verdict upon the first count.] Whatever the intention of the Court might have been, the rule for a new trial contains no intimation of such an intention as is now suggested: and it would be impossible to restore the plaintiff to the situation he was in at the time the rule was made

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absolute. Had he supposed that he would be liable to any of the costs of the first trial, possibly he might have declined to go down again. There is no verdict and judgment for the defendants on the first trial remaining upon the record. The learned Serjeant referred to *Newberry v. Colvin* (a), and *Goodburne v. Bowman* (b).

TINDAL, C. J.—The 64th section of the first rule of Hilary Term, 2 Will. 4, does not at all apply to this case. This is an application to our discretion. It was clearly and palpably an oversight on our part to pronounce the rule in such a form as would have the effect of depriving the defendants of a verdict that, in the mode in which the cause was sent down again, they could not by possibility obtain upon the second trial. It was virtually and substantially the intention of the Court that the verdict should stand except as to the second count. A word of suggestion at the time would have caused us to put the matter beyond question. The rule referred to only applies to the case of a new trial upon the whole record—meaning, where the verdict *may be* the other way on the second trial. That could not have been the case here.

The rest of the Court concurring—

Rule discharged, without costs.

(a) Ante, vol. 2, p. 415.

(b) Ante, vol. 2, p. 206; 3 M. & Scott, 69; 9 Bing. 667.

SHARP v. HAWKER.

The Court of C. P. cannot exercise a summary jurisdiction over a party who is not one of its own officers, although the matter be pending here.

HUMPHREY, on a former day, obtained a rule calling upon the plaintiff's attorney to shew cause why he should not pay over to his client money received by him in the course of the cause.

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v.
HAWKER.

Whitmore shewed cause, upon an affidavit stating that the party against whom the application was directed was not an attorney of this Court, but had acted in the name of one who was. He cited *In re Lord* (a), to shew that the Court had no authority over parties not being its officers.

Humphrey, in support of his rule.—The ground of decision in those cases was, that there was *no cause* in Court. Unless the motion is made in the Court in which the cause is pending, the plaintiff is without remedy. And it cannot be permitted to a party who has assumed to act as an attorney of the Court, to turn round and say, when it suits his purpose, that he is not one. Besides, the objection has been waived. [*Vaughan*, J.—How can an objection of this nature be waived? We cannot deal with the party at all, unless he is an officer of this Court].

Butt (*amicus curiæ*) referred to *In re Greaves* (b). There, an action having been commenced in this Court, and judgment obtained, an attorney of the King's Bench (but not of the Common Pleas), who was attorney for the defendant, verbally agreed to give his two notes for the debt and costs, in consideration of the plaintiff staying the proceedings; and it was held, that, although the undertaking was void by the Statute of Frauds, the Court of King's Bench might nevertheless exercise a summary jurisdiction over one of its own officers, and compel him to perform it.

TINDAL, C. J.—The difficulty I feel in this case is, that, if it should ultimately become necessary to strike this person off the roll, we could not do it. Suppose he were ordered to pay over the money, and should refuse to obey

(a) 2 Scott, 131.

(b) 1 C. & J. 374, n.

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such order, what remedy would the client have? It seems to me that the rule is answered by the fact of the alleged delinquent being de hors our jurisdiction. The rule must be discharged, but without costs.

GASELEE, J.—I am of the same opinion. It is highly desirable that some rule should be made by all the Courts to meet the case of an attorney of one Court acting in the name of an attorney of another Court, by making both equally amenable to the Court in which the cause is pending.

The rest of the Court concurred.

Rule discharged, without costs.

WOOD v. HURD.

The Court refused to order satisfaction to be entered upon the record in an action for breach of promise of marriage, without a warrant of attorney from the plaintiff, notwithstanding a judge's order had been obtained for the purpose.

THIS was an action for a breach of promise of marriage. The damages and costs having been paid—

Butt moved to enter satisfaction on the record under a judge's order. The Secondary (Mr. *Cancellor*) had objected that a warrant of attorney from the plaintiff on the record was necessary. This, it was submitted, was not the practice of the other Courts; and the attorney was the proper person to receive the money.

Mr. *Cancellor* observed that the order in this Court is always drawn up "upon reading the warrant of attorney."

TINDAL, C. J.—We cannot depart from the practice of the Court. The warrant of attorney is the only security to the Court that the damages have been paid to the plaintiff. How are we to say that the attorney who conducted the suit for the plaintiff is now the attorney upon the re-

cord? Getting rid of a judgment of the Court is so solemn a thing, that I think we should not be warranted in departing from a practice which appears so consonant with reason and good sense.

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The rest of the Court concurred.

Rule refused.

WEATHERHEAD and Another v. LANGLES.

A SCIRE FACIAS (to revive a judgment) was lodged with the sheriff, and notice given to the defendant (who resided at Paris) on the 17th May. The writ was returned nihil: and now, on the 8th June—which was more than eight days since the return of the sci. fa.—

The Court will permit judgment to be signed on a sci. fa. after eight days from the return, where the defendant resides abroad, he having had reasonable notice of the proceeding.

W. H. Watson moved for leave to sign judgment, pursuant to the 81st section of the first rule of Hilary Term, 2 Will. 4 (a), which provides that “no judgment shall be signed for non-appearance to a scire facias without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one scire facias.” He submitted that all which was necessary under the circumstances had been done; and he cited *Hopcraft v. Fermor* (b), where this Court ordered an attachment to issue against a party for non-performance of an award, although he resided in France, where the copy of the award and rule on which the application was founded were served on him.

PER CURIAM.—It is only necessary to shew that something has been done to convey notice to the party of the proceeding against him.

Fiat.

(a) Ante, vol. 1, p. 1.

(b) 8 Moore, 424; 1 Bing. 378.

1836.

GRAINGER v. TAUNTON.

The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 61, has effected no change in the mode of executing process from the superior courts in the city of Oxford; they are still to be executed by the sheriff of the county.

BY the 61st section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, it is enacted "that, in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester, Coventry, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, and York, and in the counties of the towns of Caermarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council shall on the 1st of November in every year appoint a fit person to execute the office of sheriff, with the like duties and powers as the sheriff *or the person filling the office of sheriff* in the said town and counties respectively would have had if this act had not passed; and every person who at the time of the passing of this act shall hold the office or execute the duties of sheriff in the said town and counties respectively, shall continue to hold and execute the same until the first appointment of a sheriff therein under the provisions of this act, and no longer."

Before the passing of the above act, there were two local courts in the city of Oxford, and two bailiffs having the execution of process there, but not of process issuing out of the superior courts of Westminster, which were always executed by the sheriff of the county. Under the act, a sheriff of the city had been duly elected by the town council. To this officer a writ of testatum ca. sa. sued out in this cause was directed. Conceiving that the sheriff of the county was, as heretofore, the proper person to have the execution of all writs from the superior courts, the sheriff of the city refused to return the writ: and in order to raise the point he was ruled to return it, to set aside which rule—

Henderson obtained a rule nisi, on the ground that it

called upon the sheriff of the city to do an act which by law he could not do.

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F. Kelly shewed cause.—The simple question here is, whether it is the duty of the sheriff of the city or of the sheriff of the county to execute the process of the superior courts. Before the passing of the late act, that duty, it appears, devolved upon the sheriff of the county. But it appears also that there were certain officers in Oxford who before the act had certain duties to perform in relation to the office of sheriff. In several of the places mentioned in the 61st section, there were sheriffs who before the act did execute process within their several jurisdictions, and some where there were no sheriffs at all *ex nomine*; but in all, save in Oxford, writs were executed by some officer within the city or town. The object of the enactment was, that each of the places named should have its own proper officer; that the practice should be uniform throughout the kingdom. [*Tindal*, C. J.—There are no words in the act calculated or seemingly intended to take away from the sheriff of the county any jurisdiction he before possessed. The fault here seems to have been in addressing the writ to the wrong person.] The act clearly intended that the new sheriff should do all that the sheriff of the county would before the passing of the act have had to do. Could it have been intended that the new officer should have no greater jurisdiction than the bailiff already had?

Henderson, contra, was stopped by the Court.

TINDAL, C. J.—On looking at the 61st section of the act, the construction it is to receive appears to me to be very plain. The clause affects to deal with places which had and with places which had not sheriffs before the passing of the act; it directs that the town council shall

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on a given day appoint a fit person to execute the office of sheriff, and it goes on to state what shall be the duties of the person so appointed—"the like duties and powers as the sheriff or the person filling the office of sheriff in the said towns and counties respectively would have had if this act had not passed." It appears here that the city of Oxford had no sheriff, no person filling the office, no person whose duty it was to receive and return the process of the courts at Westminster. I think the power to execute such process is still limited to the sheriffs of those places which had sheriffs before upon whom that duty rested. The writ in the present case ought not to have been directed to the sheriff of the city. I cannot help thinking, that, if the legislature had intended to take away from the sheriff of the county any of the powers or authorities he possessed before the passing of the act, they would have expressed themselves in direct terms to that effect, or at least the act would have contained words of direction to the courts. I think the rule must be discharged.

PARK, J.—I am of the same opinion. There is nothing in the act to alter the mode of directing writs. We can only judge of the intention of the legislature from the language they use.

GASELEE, J., concurred.

VAUGHAN, J.—I am also clearly of opinion that there is nothing in the act to warrant a supposition that the legislature intended to detract in any degree from the authority of the sheriffs of counties.

Rule absolute, without costs.

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GREGORY v. DES ANGES, Knight.

BOMPAS, Serjeant, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the proceedings on the bail-bond given in this action should not be set aside, on the ground of irregularity. The principal irregularity insisted upon was, that the writ of *capias*, which had issued on the 12th December, 1835, had not been returned when the alias *capias* issued (22nd April, 1836) under which the defendant had been arrested. The learned Serjeant contended that a return to the first writ was essential to the validity of the alias—2 Will. 4, c. 39, s. 10, which enacts “that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ.”

It is not essential to the validity of an alias or pluries that the writ of summons or *capias* should be previously returned, except where the object is to save the statute of limitations, or where the *capias* is made the foundation of proceedings to outlawry.

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Adams, Serjeant, and *R. V. Richards*, shewed cause, contending that the clause above cited only required the *capias* to be returned before the issuing of the alias in those cases where the *capias* is issued for the purpose of saving the statute of limitations.

Bompas, Serjeant, in support of his rule.—In order to justify the issuing of an alias, the *capias* must be returned: and, unless the *capias* be returned within one month after the four months during which the act provides that it shall remain in force, it cannot be returned at all. The statute intended the alias to be a continuation of a previous writ, which it cannot be if that writ has lost its efficacy.

TINDAL, C. J.—Upon reference to the 10th section of the 2 Will. 4, c. 39, I do not find that the return of the *capias* is made necessary to the issuing of the alias. On the contrary, I am led to infer that it was not necessary, or that it might be made, in ordinary cases, at any time afterwards. Were it not so, great inconvenience would often result: the sheriff might during the long vacation neglect to make his return, when he could not be ruled to return the writ probably until long after (supposing the defendant's argument is to prevail) the writ had ceased to be an efficient writ. The *capias* is to be in force four months; but it "may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith"—making the issuing of the alias or pluries depend, not on the return of the preceding writ, but on the service or non-service. Then follows a proviso which is applicable only to those cases where it is sought to prevent the operation of the statute of limitations, making a return of the first writ essential for this purpose. It is clear from the 5th section that the legislature were aware of the difference between the expiration and the

return of a writ; that section makes the return of non est inventus to the writ of capias, and of non est inventus and nulla bona to the distringas essential to the proceeding to outlawry. With respect to the clause now more immediately under consideration, I think we are not at liberty to insert therein as a necessary preliminary that the capias shall in all cases be returned before an alias can issue.

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PARK, J.—I am of the same opinion. If the intention of the legislature was that the capias should be returned before the issuing of the alias or pluries, they have not been successful in expressing it. The proviso in the 10th section, where the return is required, applies only to the case of writs issued for the purpose of saving the statute of limitations. It seems to me that there has been no irregularity in this case.

The rest of the Court concurred.

Rule discharged, with costs.

FURNIVAL v. STRINGER.

THE plaintiff being in the custody of the warden of the Fleet, under an execution issued against him in another cause, was brought up by the defendant under a writ of habeas corpus ad satisfaciendum and charged in execution for the costs of a nonsuit in this action.

A writ of habeas corpus lies to bring up a plaintiff already in custody, in order to charge him in execution for costs of a nonsuit: and no affidavit is necessary to warrant the issuing of the habeas corpus: nor is it necessary that any roll of judgment

Goulburn, Serjeant, on a former day, obtained a rule calling upon the defendant to shew cause why the plaintiff should not be discharged out of custody as to this

day certain for the bringing up of the party should be inserted, or that the number should appear therein.

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suit, on the grounds—first, that the course pursued here was applicable only to the case of a defendant charged for debt or damages and costs at the suit of the plaintiff, the defendant being already in custody upon mesne process in the cause—secondly, that the committitur had been entered and the habeas corpus sued out, without any affidavit to inform the Court of the grounds for the detention of the party—thirdly, that there was a mistake in the writ as to the day for the plaintiff's appearance in Court to be charged. He cited *Smith v. Sandys* (a).

Spankie, Serjeant, shewed cause.—The proceedings are strictly in accordance with the practice of the Court. By the rule of court of Michaelmas Term, 1654, s. 10, it is provided “that a habeas corpus ad satisfaciendum may be granted to the warden of the Fleet, or to such inferior gaoler, returnable in Court on a day certain; the number roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writs to be a cause of detainer.” There is nothing in the rule to confine it to the case of a defendant. If it were so, or if a defendant could only be brought up under a habeas corpus where he is already in custody in the same suit, defendants in all cases, and plaintiffs in actions of tort, would be driven to an action for the recovery of their costs. The rule requires no affidavit. And with respect to the date, that, since the new rules, is perfectly immaterial.

Goulburn, Serjeant, in support of his rule.—The writ of habeas corpus was originally granted, and is adapted in practice to the relief of prisoners, and to the changing the place of their custody. The question is, whether a defendant can of his own mere motion, and, without laying any ground by affidavit, or otherwise, of right issue such a writ and bring up the plaintiff not in custody in the

(a) 5 Nev. & Man. 60.

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same suit to charge him in execution for costs. No case is to be found to warrant it; and the rule of 1654 leaves the matter just where it was. Lord Denman, in *Smith v. Sandys*, says: "The proceeding by side-bar rule does not operate to charge a prisoner in execution, unless he is at the time in custody in the particular suit; where the party is not in custody in the particular suit, the proper course is to file a declaration against him under the 4 & 5 W. & M., c. 21, which would operate as a detainer, and then bring him up and charge him in execution.

TINDAL, C. J.—The only question here is, whether the defendant has complied with the rule of this Court of 1654. That rule provides "that a habeas corpus ad satisfaciendum may be granted to the warden of the Fleet, or to such inferior gaoler, returnable in Court on a day certain; the number roll of the judgment to be indorsed upon the writ by the attorney who sues it out: *and such writs to be a cause of detainer.*" The first objection here is, that, in the present instance, the writ of habeas corpus has been obtained against the plaintiff; and it is said that that writ and course of proceeding is applicable only to the case of a defendant in custody in the particular suit. I see nothing in the rule limiting its operation to the case of a defendant: and it applies as well to a plaintiff for the purpose of charging him with costs as to a defendant for the purpose of charging him with damages and costs; for, you cannot assume as a general position that the defendant is already in custody in the particular suit.—It is then suggested that the habeas corpus should not be sued out without an affidavit—that there is in such case nothing to inform the Court of the circumstances under which the writ is sued out. But, in the ordinary case of a habeas corpus, the course is to take the party before a judge, who indorses it. If the judge saw any reason for it, he

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would call for further information or authority for the issuing of the writ. The party on appearing in Court may shew cause against it. I therefore think as much has been done in this case as is usual.—A further objection is, that the number roll of the judgment is not indorsed on the writ. That, however, is not necessary since the new rules. When the party is brought up and makes no objection, the Secondary marks the committitur on the back of the writ; he sees the postea, upon which the allocatur for the sum charged for costs is made by the prothonotary, and in general a judgment paper. It seems to me therefore that there is every guard for the protection of the party that could possibly be required.—Then it is said that the defendant might have brought his action for the costs. But that would be a most inconvenient and circuitous mode; and it is never resorted to unless the judgment is more than a year old, or under very particular circumstances. And, after all, I must say that the case of *Smith v. Sandys*, that has been cited, goes very far to shew that all has been done here that was necessary.

The rest of the Court concurred.

Rule discharged.

GOODFELLOW v. ROLLINGS.

The 48 Geo. 3, c. 123, applies to the case of a prisoner in execution for damages not exceeding 20*l.*, recovered against him in an action for crim. con.

THE defendant having remained in execution for more than twelve months for damages to the amount of 20*l.* recovered against him in an action for criminal conversation with the plaintiff's wife—

Crowder moved that he might be discharged under the statute 48 Geo. 3, c. 123, which enacts that "all persons in execution upon any judgment for any debt or *damages* not exceeding the sum of 20*l.*, exclusive of the costs re-

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covered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as thereafter mentioned, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution by the rule or order of such court." He referred to *Winter v. Elliott* (a), where the statute in question was held to apply to persons in execution for damages in actions of assault.

Barstow shewed cause in the first instance.—The statute 48 Geo. 3, c. 123, was obviously not intended to apply to a case like the present. The title and preamble shew that *debts* only were contemplated. That part of the statute which relates to the liability of bail was not adverted to in *Winter v. Elliott*: and it may be that the word "damages" was used in reference to debts recovered in the shape of *damages*. It is clear from the 41 Geo. 3, c. 70 (insolvent debtors act), the 41st section of which expressly excludes from the benefit of that act parties charged in execution for damages given in actions of this sort, and from the 53 Geo. 3, c. 102, s. 37, which provides that they shall remain in prison for a period of five years, that such damages were not in the contemplation of the legislature, when passing the 48 Geo. 3, c. 123.

TINDAL, C. J.—I see no reason for withholding our assent to the decision of the Court of King's Bench in *Winter v. Elliott*, where a more extended signification is applied to the word "damages" than that which is now contended for on the part of the plaintiff. It is to be

(a) 3 N. & M. 315, 1 Ad. & El. 24.

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observed that under the 48 Geo. 3, c. 123, a boon is given to the plaintiff: he may, notwithstanding the defendant's discharge, still sue out a fi. fa. against his goods (*a*). The legislature may probably have thought a year's imprisonment a sufficient punishment where the damages given by the jury do not exceed 20*l*.

The rest of the Court concurred; VAUGHAN, J., observing that the act was remedial, and therefore ought to receive a liberal construction.

Rule absolute.

(*a*) "Provided always, that, for and notwithstanding the discharge of any debtor or debtors by virtue of this act, the *judgment* whereupon any such debtor or debtors was or were taken or charged in execution, shall nevertheless remain and continue in full force to all intents and purposes, except as to the taking in execution the person or persons of such debtor or debtors thereupon, as is hereinafter provided; and that it shall and may be lawful for the creditor or creditors at whose suit such debtor or debtors had been, was, or were so taken or charged in execution, to take out all such *execution* or executions on every such judgment, against the lands, tenements, hereditaments, goods and chattels of any debtor or debtors (other than and except the

necessary wearing apparel of and for him, her, or them, and for his, her, or their family, and the necessary tools for his, her, or their trade or occupation, not exceeding the value of 10*l*. in the whole), or to bring any such action or actions on any such judgment against such debtor or debtors respectively, or to bring any such action or use any such remedy for the recovery and satisfaction of his, her, or their demand, against any other person or persons liable to satisfy the same, in such and the same manner, but in such and the same manner only, as such creditor or creditors otherwise could or might have done in case such debtor or debtors had never been taken or charged in execution upon such judgment."

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KNIGHT v. WOORE.

THIS was an action of trespass. The defendants in their third plea justified the trespasses complained of under an alleged right in the inhabitants of the town of Monmouth to pass and repass with horses, carts, and carriages, for the purpose of bringing water and goods from the river Wye, which was proved to be navigable. The replication denied the alleged right of way. At the trial the jury affirmed the right set up as to the fetching water, but negatived the right set up as to the goods.

Ludlow, Serjeant, in Easter Term last, obtained a rule calling upon the defendant to shew cause why the verdict should not be entered generally for the plaintiff upon the whole record.

Maule and *Whateley* shewed cause.—The defendant is entitled to have the verdict entered for him in respect of that part of the third plea which the jury have found for him. Before the new rules of pleading (Hilary Term, 4 Will. 4) (a), the defendant would have separately pleaded each of the rights of way that are set up by the plea in question: since the promulgation of those rules, the main object of which was the shortening of records, the whole may be contained in one plea. By the fifth division of those rules, s. 4, it is provided, that, “where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and, if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.” “And (s. 5) where, in an action

In trespass, the defendant in his third plea justified under an alleged right of way with horses, carts, and carriages, for the purpose of fetching goods and water from a navigable river. The jury affirmed the right set up so far as it related to the fetching of water, but negatived it as to the rest:—The Court directed the verdict to be entered distributively (for the plaintiff as to the goods, for the defendant as to the water), under the rules of Hilary Term, 4 Will. 4, *Trespass*, V., ss. 4—6.

(a) Ante, Vol. 2, p. 325.

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of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle, ex. gr., horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified." "And (s. 6) in all actions in which such right of way or common as aforesaid, *or other similar right*, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively." The obvious intention of these rules was, that, if the defendant proved only one part of a plea setting up distinct and divisible rights, he should have the benefit of the verdict for that part, as if the several rights had been separately pleaded: and such is the construction which the Court of Exchequer has put upon them in the late case of *Phythian v. White (a)*.

Ludlow, Serjeant, and *R. V. Richards*, in support of the rule, contended that, the defendant having failed to establish the right set up by the plea in the manner and to the extent therein alleged, the entire verdict must be entered for the plaintiff.

TINDAL, C. J.—I am of opinion that this case falls within the rules to which our attention has been directed. The right of way set up by the defendant in his third plea being negatived as to the carrying of goods, and affirmed as far as it related to the fetching of water from the river Wye, the plaintiff is entitled only to have the verdict upon the plea entered for him in respect of the first right claimed; as to the other, the verdict must be entered for the defendant.

(a) Ante, Vol. 4, p. 721.

PARK, J.—I am of the same opinion. Were we to decide otherwise, we should go far to defeat one of the most important objects of the late rules. The right here claimed embraces two several things: the jury have negatived one and affirmed the other. The case is clearly within the rules adverted to.

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GASELEE, J.—Upon the finding as reported to us, the course suggested is clearly the proper one. If the right pleaded had been a right of way with carriages and cattle and on foot, and the jury had established the right of way *with cattle or on foot only*, the verdict would unquestionably have been entered for the defendant in respect of the qualified right so found. In the present case the right is, in the language of the 6th rule, “so pleaded that the allegations as to the extent of the right are capable of being construed distributively,” and therefore is to be so taken.

VAUGHAN, J., concurred.

Rule discharged, without costs.

ARNOLD v. ARNOLD.

ASSUMPSIT for money lent. The writ issued on the 20th February; the declaration was filed on the 8th March, stating the cause of action to have accrued on the 27th February. A verdict having been found for the plaintiff—

Newman, on a former day in this term, moved in arrest of judgment, on the ground that, on the face of the record, it appeared that the cause of action accrued after

In assumpsit for money lent, the writ issued on the 20th February; in the declaration, which was delivered on the 8th March, the cause of action was alleged to have accrued on the 27th February:—*Held*, no ground for judgment.
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the commencement of the action. In *Ward v. Rich* (a), where an action was brought for taking away the plaintiff's wife, and keeping her from him until such a day, which was some time *after* the exhibiting of the bill, after verdict for the plaintiff, judgment was arrested, because the jury must be intended to have given damages for the *whole* time mentioned in the declaration. In *Brasfield v. Lee* (b), the plaintiff declared that the defendant imprisoned him the 1st October, 9 W. 3, and detained him in prison for four months; and after verdict for the plaintiff, and entire damages, judgment was arrested, because the declaration being of Michaelmas Term, 9 W. 3, and the damages being entire, and given for the imprisonment of four months from the 1st October, it appeared that the damages were given for imprisonment after the action was commenced. *Baker v. Bache* (c), and *Hamburgh v. Ireland* (d) are authorities to the same effect: and Mr. Serjeant *Williams* says (e): "These cases seem to establish this principle, that, where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but, where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment." The day is material. The statute of Jeofails 16 & 17 Car. 2, c. 8, only provides that judgment shall not be arrested for a mistake of time where the day has been once truly alleged: here it is not once truly alleged. In Com.

(a) 1 Vent. 103.

(d) Cro. Jac. 618.

(b) 1 Ld. Raym. 329.

(e) 2 Wms. Saund, 171 c.

(c) 2 Ld. Raym. 1382.

Dig. Pleader (C. 19), where all the earlier authorities are collected, it is said: "The time of a matter charged in the declaration ought to be certainly alleged; and therefore in *assumpsit*, if the plaintiff omits the day when the promise was made, it is bad." [*Tindal*, C. J.—It is not to be assumed that I admitted evidence of what occurred after the issuing of the writ.] The Court will only intend that a consistent time was proved at the trial where the contrary does not appear upon the record—*Bull v. Steward* (a), *Acton v. Eels* (b), *Champion v. Skipweth* (c), *Dickenson v. Plaisted* (d). Here the contrary does so appear.

A rule having been granted,

Bompas, Serjeant, shewed cause, relying upon *Stuart v. Layton* (e), where the writ was issued on the 24th of June, and the slander of which the plaintiff complained was alleged to have been uttered on the 27th, and the Court refused to arrest the judgment.

The Court called upon—

Newman to support his rule.—He repeated the arguments and re-cited the authorities already referred to; and mentioned in addition, *Rol. Abr.* 792, pl. 12.

TINDAL, C. J.—It appears to me that no ground has been laid for arresting the judgment in this case. The statute 16 & 17 Car. 2 applies to cases where a mistake in the day occurs, the day being material. The ground of our decision here, is, that the day is perfectly immaterial. This was determined in two cases, *Cole v. Haw-*

(a) 1 Wils. 255.

(b) Salk. 662.

(c) Sid. 307.

(d) 7 T. R. 474.

(e) Exch. Easter. T. 1836.

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tins (a), where, for that reason, it was held, on demurrer, that the alleging a different day in the replication was no departure, and *Matthews v. Spicer* (b), where the plaintiff declared in assumpsit upon a promise made 26th of March, 12 G. 1; the defendant pleaded, that, after the promise, and before the bill filed, viz. on the 2nd April, he tendered the money; the plaintiff replied, that, after making the promise, *scilicet*, 12th February, he filed his bill, &c.: and, upon demurrer, it was objected, that, by the plaintiff's own shewing, he had brought his action before the cause of action accrued; for, the promise he declared on was 26th March, and his bill was filed 12th February, before. *Sed, per curiam*: as the plaintiff would not in evidence have been confined to the day in his declaration, there is no reason he should be more confined in pleading. Indeed, if this was a note, the day would be material, and an essential part of the agreement, from which he could not vary; but, in the case of a common assumpsit, the day is alleged only for form, and therefore the defendant cannot confine the plaintiff to the day alleged in the declaration. We cannot assume that damages have been found for a cause of action accruing since the issuing of the writ; therefore there is not that discrepancy upon the face of the record, which the law requires before a judgment is arrested.

The rest of the Court concurring—

Rule discharged.

(a) Str. 21.

(b) Str. 806.

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RANSON and Others v. DUNDAS and Another.

THE Court having on a former day permitted the plaintiffs to enter up judgment on the certificate of the Speaker of the House of Commons, pursuant to the statute 9 Geo. 4, c. 22, s. 63, for the costs incurred by the plaintiffs in the prosecution of a petition against the return of the defendants, as members for Ipswich, the committee having reported the opposition of the defendants to such petition to be frivolous and vexatious—

The Court refused to enter on the roll a suggestion of the grounds of their judgment, on a motion, under the 9 Geo. 4, c. 22, to enter up judgment on the certificate of the speaker of the house of commons, for costs incurred by the plaintiffs in the prosecution of a petition against the return of members.

Sir *John Campbell*, A. G., in order to take the opinion of a Court of error, moved for leave to enter a suggestion on the roll, of the grounds on which the judgment of the Court had proceeded.

He contended, that, where judgment is given contrary to the course of the common law, though on motion, the facts that warrant the judgment ought to be suggested on the record; as, in the case of costs awarded to a defendant under the statute, 43 Geo. 3, c. 46, s. 3, where, though nothing is said in the statute about a suggestion, it is the practice to enter on the record a suggestion that the defendant has been arrested and held to bail for a larger sum than the plaintiff had reasonable or probable cause for arresting him for, whereupon the defendant has judgment entered for his costs. The omission to enter such a suggestion in that case would manifestly be error. So, in the case of a judgment as in case of a nonsuit under 14 Geo. 2, c. 17—Tidd's Pr. Forms, 273, or on the Welsh Judicature Act—Tidd's Pr. Forms, 393. So, where commissioners of taxes obtain their treble costs, a suggestion is entered that they are sued as commissioners. Wherever the judgment entered in favour of a party would be erroneous but for a suggestion, a suggestion ought to be entered; and though the statute in question gives no

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positive directions as to a suggestion, still it is necessary to shew that the Court had jurisdiction. In the absence of a suggestion, the judgment by nil dicit would be a judgment contrary to the fact. [*Tindal*, C. J.—Suppose the plaintiffs traverse the suggestion, what machinery is provided by this act to bring the question of fact before a jury? Under the Court of Conscience Acts, the party is permitted to traverse. A proceeding by consent would not suffice. Suppose a case of perjury.] Unless the act expressly prohibits a suggestion, the defendants are clearly entitled to have it entered. In *Kemp v. Potter* (a), it was held that where the plaintiff in an action against a bankrupt makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion, recording the election, put on the record: and in *Farr v. Denn* (b), it was also held, that, if an ejectment be against two, and one die after issue joined, but before trial, the death must be suggested on the roll.

TINDAL, C. J.—We should be happy if the facts of this case could in any way be put on record, so as to bring our decision before a higher tribunal; but we do not see that any power is reserved to us to pursue the course suggested. The 63rd section enacts “that the certificate of such amount so signed as aforesaid by the speaker shall have the force and effect of a warrant to confess judgment; and the Court in which such action shall be commenced shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment to that amount.” We must, therefore, consider the speaker’s

(a) 6 Taunt. 549.

(b) 1 Burr. 362.

certificate the same in effect as a warrant to confess judgment for the same amount, and this motion as a motion to set aside the warrant, and we must deal with it as we should with any other motion of the same kind: that being done, there is an end of our jurisdiction. The validity of the warrant being established, who ever heard of going into an inquiry as to preceding facts? It appears to me it would be idle, inoperative, and injurious to the rights of the plaintiffs to put upon the record that the only effect of which can be to create delay.

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PARK, J.—I am of the same opinion. This is quite a novel attempt.

GASELEE, J.—I was not present when the case was argued: but, from the short view I have had of the matter, I see nothing in the statute to warrant me in opposing the opinion of the rest of the Court.

Rule refused.

One of the plaintiffs having died since Hilary Term—

Talfourd applied for leave to enter up the judgment as of that term.

THE COURT, however, refused to interfere.

WORTHINGTON v. WIGLEY.

DEBT on bond.—*Miller*, on a former day, obtained a rule nisi for a new trial, on the ground of a variance between the issue delivered and the roll. The variance complained of was, that, in the issue delivered, the plead-

The omission to transcribe into the issue delivered the dates of the pleadings, constitutes a variance of which

the defendant is entitled to avail himself after trial, and the roll is made up, although the dates appear on the roll.

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ings were not dated (*a*), but the proper dates were stated on the roll. At the trial, no counsel appeared on the part of the defendant, and a verdict was taken for the plaintiff for the debt on the record, and one shilling damages.


Atcherley, Serjt., shewed cause.—The question is, whether the omission to transcribe the date of the pleas into the issue delivered to the defendant, is such an objection as to render the delivery of the issue a nullity. The defendant must know when he pleads. [*Tindal*, C. J. —The defendant must equally know *what* he pleads: you might as well say, that the omission of the pleas altogether would be immaterial. The date of the plea might, in many cases, become very material.] The rule requires the insertion of the date for the information, not of the party pleading, but of his opponent; and it requires the date to be entered on the record, which has been done here. It is not in terms required in the issue delivered. The defendant should, at all events, have returned the issue, instead of suffering the plaintiff to go on and incur expense.

Miller, in support of his rule, was stopped by the Court.

TINDAL, C. J.—The simple question here is, whether or not there is any variance between the issue delivered and the roll, which the defendant has a right to stand upon. The issue must, no doubt, be a faithful transcript of the pleadings. The rule referred to, requires that “every pleading, as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declara-

(*a*) 1 Reg. Gen. Hilary Term, 4 Will. 4, (Pleading Rules), Ante, Vol. 2, p. 313.

tion and other pleading shall also be entered on the record made up for trial, and on the judgment-roll, under the date of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge." The omission to state the true date would clearly be such an irregularity that, if it occurred in the record itself, might be complained of at any time. The issue is all that is communicated to the defendant before the trial. The objection certainly is one of a very capacious nature; but still one that the party had an undoubted right to insist upon.

1836.

 WORTHINGTON
 v.
 WIGLEY.

The rest of the Court concurring—

Rule absolute, the defendant undertaking to accept short notice of trial for the next Sittings.

END OF TRINITY TERM.

KING'S BENCH PRACTICE COURT.

Michaelmas Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

MICHAELMAS TERM, 1836.

1836.

3rd Nov.

REGULA GENERALIS.

IT is Ordered, that, from and after the last day of this Term, all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight day rules instead of six day rules.

DENMAN.

N. C. TINDAL.

ABINGER.

J. A. PARK.

J. LITTLEDALE.

S. GASELEE.

J. VAUGHAN.

J. PARKE.

W. BOLLAND.

J. B. BOSANQUET.

E. H. ALDERSON.

J. PATTESON.

J. GURNEY.

J. WILLIAMS.

J. T. COLERIDGE.

1836.

DOE *d.* WATTS *v.* ROE.

ROGERS applied for a rule to shew cause why the tenant should not give the undertaking, and enter into the recognizances required by 1 Geo. 4, c. 87, s. 1. The only peculiarity in the case was, that the tenant was under-lessee to the lessor of the plaintiff. That, however, it was presumed was immaterial, for although the lessor of the plaintiff was the original lessee, as between him and the tenant, the latter held under a lease sufficient to bring the case within the terms of the statute.

It is immaterial, in an application under the 1 Geo. 4, c. 87, s. 1, that the lessor of the plaintiff is the original lessee, and the tenant his sub-lessee.

LITTLEDALE, J.—I think that makes no difference. You may therefore take your rule as prayed.

Rule granted (a).

(a) See *Doe d. Tindal v. Roe*, Ante, Vol. 1, p. 143.

Ex parte STRONG.

SEWELL applied for a writ of habeas corpus, directed to the keeper of Ilchester gaol, for the purpose of bringing the applicant into the Ecclesiastical Court of Wells, to purge himself of a contempt of that Court by performing such further penance as that Court should direct. The defendant was in the custody of the keeper of the gaol, under a writ de contumace capiendo, issued in pursuance of 53 Geo. 3, c. 127, s. 1. That act of Parliament substitutes in certain cases the writ de contumace capiendo for that of de excommunicato capiendo, and directs that such writ shall issue out of the Court of Chancery on a significavit from the Ecclesiastical Court. It is directed to the sheriff, commanding him to take the body of the contumacious person, and to keep him until he shall have made satis-

The Court of King's Bench, it seems, will not grant a ha. cor. to remove a defendant out of custody, on a writ de contumace cap., for the purpose of doing penance before an Ecclesiastical Court, although the Lord Chancellor will.

1836.

Ex parte
STRONG.

faction for his contempt. The writ being issued, it is directed to be read in Court, and afterwards inrolled in the Court of King's Bench. If, afterwards, the contumacious person submits himself, and purges his contempt, a liberate is issued by the Court towards which the contempt has been committed, and directed to the sheriff, gaoler, or other officer in whose custody he was, and thereupon the prisoner is discharged. In the present case the contumacious person was desirous of submitting himself, and performing the penance enjoined; but, being in custody, it was impossible for him so to do. The present application was therefore made to this Court, as having a general supervision of all inferior Courts, and also as having, under the language of the statute, jurisdiction over the writ itself, and all proceedings under it. If the application was not granted, it would amount to a sentence of perpetual imprisonment.

LITLEDALE, J.—The writ, it appears, issues out of Chancery on the *significavit* to that Court. I do not therefore see how this Court can interfere with the custody of a person who is in custody under the process of another superior Court. I therefore will not grant the application. You may, if you choose, renew it in the full Court.

Rule refused.

Sewell did not renew his motion in the full Court, but applied to the Court of Chancery, where the Lord Chancellor granted his application, expressing an opinion that the jurisdiction of the Court of Chancery and that of the King's Bench was, in this matter, concurrent.

1836.

JOHNSON v. FRY.

MANSEL moved for leave to enter up judgment on an old warrant of attorney. The affidavit on which he moved stated, that the defendant had been seen alive, two or three days before the first of March last, in New South Wales. The person making the affidavit had arrived in England in the month of September last. As the doctrine of relation was abolished by 3 Reg. Gen. H. T. 4 Will. 4, (Practice Rules) (a), by which judgments were only to have relation to the day on which they were signed, the length of period which had elapsed since the party had been seen alive, was immaterial. He cited *Fursey v. Pilkington* (b), where the defendant had been seen alive in the month of September previous to the Hilary Term in which the application was made: the defendant was then in the West Indies. That case was before the late rule, and consequently before the doctrine of relation was abolished. Additional force, therefore, was to be attached to the observations of Mr. Justice Parke, who granted the application. His Lordship said, "I think that will do, as from the distance no one can make an affidavit of the defendant being alive within the term, nor can you receive a letter from him dated within the term. You may therefore take a rule for judgment; and if it turns out that he was not alive within the term, his representative may apply to set it aside." On the authority of this case, it was conceived that sufficient materials had been laid before the Court to induce it to allow judgment to be entered up.

The Court allowed judgment to be signed on an old warrant of attorney, the application being made on the 5th of November, in Michaelmas Term, although the defendant had not been seen alive since two or three days before the 1st of March previous, and then in New South Wales.

LITTLEDALE, J.—I feel some doubt whether the rule ought to be granted. I will therefore take the opinion of the other Judges.

Cur. adv. vult.

(a) Ante, Vol. 2, p. 313.

(b) Ante, Vol. 2, p. 452.

1836.
JOHNSON
v.
FRY.

LITLEDALE, J.—I have spoken to the other Judges, and we think you may take your rule.

Rule granted (a).

(a) See *Hopley v. Thornton*, 2 D. & R. 12, where the application was made on the 7th November, and the defendant was shewn to have

been alive in August previous, in New South Wales, and the Court granted the application.

But the deponent: "Look to the above named Deft:"
is enough: Allen v. Littledale. 5 D. & R. 248.

STRIKE v. BLANCHARD.

In an affidavit by an attorney's clerk, it is unnecessary for him to state his own residence, if he states that of his master.

HOGGINS, in shewing cause against a rule in this case, objected to the affidavit on which the rule had been obtained, on the ground that the deponent was not sufficiently described. He stated himself to be the clerk of the attorney, whose name and residence were given, but the residence of the clerk was not given. This, it was submitted, was not a sufficient compliance with the rule of Court (a), which required the addition of every person making an affidavit to be inserted therein.

LITLEDALE, J.—That is sufficient, as the residence of the attorney is given. It is unnecessary to give the residence of the clerk.

Hoggins then proceeded to shew cause on the merits.

(a) 1 Reg. Gen. H. T. 2 W. 4, s. 5, ante, Vol. 1, p. 184.

JONES v. READE.

(Before the Four Judges.)

It is competent for a defendant, under the plea of *nunquam indebtedus*, to

JOHN JERVIS moved for a rule to shew cause why the verdict in this case, found for the defendant, should not be prove a contract, by which he is liable only to a portion of the plaintiff's demand.

In an action for an attorney's bill, the defendant may, after a payment into Court, shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges.

1836.

JONES
v.
READE.

set aside, and one entered for the plaintiff, pursuant to leave reserved by the learned Judge, *Vaughan*, B., who tried the cause at the last Chester Assizes. It was an action of debt; and the declaration alleged the defendant to be indebted in the sum of 95*l.* for “work and labour of the plaintiff done and performed *as the attorney and solicitor* of and for the defendant, and upon his retainer and at his request, and for fees due and of right payable to the plaintiff in respect thereof, and for journies and other attendances about the defendant’s business, and at his request.” There was also a count for money paid, and on an account stated. The plea of the defendant was, never indebted, except as to 28*l.* 2*s.* 8*d.*: as to 15*l.*, parcel of the 28*l.* 2*s.* 8*d.*, a set-off; and as to the residue, a payment of that sum into Court. The plaintiff, as to the set-off, entered a nolle prosequi, and took the 13*l.* 2*s.* 8*d.* out of Court, alleging the defendant to be indebted to him in a further sum beyond the 28*l.* 2*s.* 8*d.* At the trial, the plaintiff proved a claim of 95*l.*, the amount of costs in an action of ejectment brought at the instance of the defendant, but in which he failed. On the part of the defendant it was proposed to prove, that the plaintiff had undertaken the cause on the terms, that, if he failed, he was only to charge the amount of costs out of pocket. This defence, it was contended, could not be given in evidence in the present state of the pleadings, but it was admitted that the sum of 28*l.* 2*s.* 8*d.* exceeded the amount of costs out of pocket. The learned Baron was of opinion that the evidence was admissible, and accordingly the defendant had a verdict. Leave was then given to make the present motion, and if the Court should be of opinion that the evidence was inadmissible, a verdict was to be entered in favour of the plaintiff for the excess of his claim beyond 28*l.* 2*s.* 8*d.*

J. Jervis now contended, on the authority of *Edmunds*

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JONES
v.
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v. Harris (a), that the defendant could not, under the plea of *nunquam indebitatus*, shew a contract by which he was only to make a payment to a particular extent, instead of that claimed in the declaration. [Lord *Denman*, C. J.—That case has been over-ruled (*b*).] *J. Jervis*, contended, that the payment of money into Court admitted the contract as laid by the plaintiff in his declaration.

LORD DENMAN, C. J.—The payment into Court only admits that something is due from the defendant, but that may be under a different contract from that alleged by the plaintiff. If it is, the defendant may shew it.

PATTESON, J.—It appears to me, that the fallacy of the argument on the part of the plaintiff is, in assuming that work done by an attorney, as an attorney, must have been at the usual rate of fees and charges, and therefore that a payment into Court admits a contract to pay for that work at the usual rate of fees and charges; whereas the work might have been done under a special contract.

WILLIAMS, J. and COLERIDGE, J., concurred.

Rule refused (*c*).

(*a*) 2 A. & E. 414.

p. 90; *Alexander v. Gardner*, 1 N.

(*b*) In *Haselden v. Staff*, T. T. last, not yet reported.

C. 671; *Cousins v. Paddon*, ante, Vol. 4, p. 488.

(*c*) See *Jones v. Nanny*, Ante,

Ex parte CLIFTON.

The Court will not summarily compel an attorney to pay money, pursuant to his un-

P*PETERSDORFF* moved for a rule to shew cause why an attorney of the Court should not pay to a Mr. Clifton the sum of 89*l.*, pursuant to his undertaking, which had undertaken to indemnify against costs, in an action where, at his instance, a party has allowed his name to be used as a plaintiff, without any interest in the matter.

1835.

Ex parte
CLIFTON.

been given under the circumstances disclosed in the affidavit of the applicant. It appeared that an action of ejectment was brought some time since for the recovery of certain premises, and, for the purposes of the action, it became necessary to make use of Mr. Clifton's name as one of the lessors of the plaintiff. This Mr. Clifton refused to allow, as he claimed no real interest in the premises. The attorney who conducted the action then offered his undertaking as an indemnity against the costs, in case of failure. This was accepted, and Mr. Clifton's name used. The action was unsuccessful; the defendant taxed his costs, and Mr. Clifton was taken in execution for their amount. In order to obtain his liberation, he gave a warrant of attorney as a security for their payment. The object of the present application was to compel the attorney to fulfil his undertaking, which he had given by way of indemnity to Mr. Clifton.

LITTLEDALE, J.—Then, you must bring an action against him on his contract of indemnity. This is a very different case from those in which the Court has been in the habit of interfering summarily against attorneys. The utmost extension of that power was in the case of *The matter of Aitkin* (a). There, the Court interfered because the employment of the attorney was so connected with his professional character as to afford a presumption that his employment was in consequence of that character; and there he was compelled in a summary way to execute the trust reposed in him. But that was a very different case from an indemnity. It is not because he is an attorney that therefore he is to be compelled summarily to perform his contract of indemnity. The proper course, it appears to me, is, to bring an action on his contract of indemnity.

Rule refused.

(a) 4 B. & A. 47.

1836.

HOLLING's Bail.

In a notice of bail, the residence must be described in terms as that which he has occupied "for the last six months;" as the Court will not infer it from the mere statement of his residence.

JOHN JERVIS applied to be permitted to justify bail, notwithstanding a defect in the notice. In it was stated the residence of the bail for the last six months; but the notice did not go on to state that he had been "resident there for the last six months." This statement, he submitted, was not necessary, as it would be presumed by the Court that the bail had complied with the rule, unless the contrary was shewn by the plaintiff. He cited an anonymous case from 1 Dowling's Practice Cases (*a*), where Taunton, J., expressed an opinion to that effect.

LITLEDALE, J.—I do not agree with that decision. I think that the statement omitted ought to be introduced into the notice, pursuant to the directions of 2 Reg. Gen. T. T. 1 Will. 4 (*b*). You may, however, take time to amend.

Rule accordingly.

(*a*) Ante, Vol. 1, p. 160.

(*b*) Ante, Vol. 1, p. 103.

BROWN's Bail.

The rule 1 Reg. Gen. H. T. 2 Will. 4, s. 5, as to the addition of deponent applies to affidavits of sufficiency made by bail pursuant to 3 Reg. Gen. T. T. 1 Will. 4; and, therefore, if it is omitted, the affidavit must be amended, and the defendant will not be entitled to the costs of justification.

MANSEL opposed bail, who had justified pursuant to 3 Reg. Gen. T. T. 1 Will. 4 (*a*), by making an affidavit of sufficiency. His objection was, that the addition of the bail had not been given. He submitted that, as the language of 1 Reg. Gen. H. T. 2 Will. 4, s. 5 (*b*) was general, that "the addition of every person making an affidavit

(*a*) Ante, Vol. 1, p. 103.

(*b*) Ante, Vol. 1, p. 184.

shall be inserted therein," and therefore must apply to affidavits made by bail, pursuant to the rules of Trinity Term, 1 Will. 4.

1836.
BROWN'S
Bail.

Fitzherbert appeared in support of the bail.

LITTLEDALE, J.—I think the rule of Hilary Term, 2 Will. 4, applies to affidavits made by bail pursuant to the rule of Trinity Term, 1 Will. 4. The affidavit may be amended, and the bail be allowed to justify; but the defendant will not be entitled to his costs of justification.

Rule accordingly.

Stocks and Another v. WILLES.

DOWLING moved, on the 5th of November, for leave to sign judgment on an old warrant of attorney. The affidavit on which he moved stated that the defendant had been seen alive on the 30th of September previous. He cited *Watts v. Berry* (a). In that case the Court allowed judgment to be entered up on an old warrant of attorney on the 17th of May, although the defendant had not been seen alive since the 23rd of April previous.

The Court allowed judgment to be entered up on an old warrant of attorney on the 5th November, the defendant not having been seen alive since the 30th of the previous September.

LITTLEDALE, J.—I think the affidavit is sufficient to entitle you to enter up judgment on the warrant.

Rule granted.

(a) Ante, Vol. 4, p. 44.

1836.

The Court will not allow a defendant, who is out of custody, to be bailed before a magistrate in the country, but he must surrender in Court in order to be bailed.

REX v. WREN.

HOGGINS applied for a writ of certiorari to remove certain depositions taken before the coroner, together with the inquisition on a charge of manslaughter against the defendant. The object of the application was, that the defendant might be admitted to bail. It appeared that the coroner had issued his warrant against the defendant, but that he had not been taken upon it. It was also sought to make it part of the terms of the rule, that the defendant should be admitted to bail before a magistrate, in order to avoid his being compelled to go into custody.

LITLEDALE, J.—(After consulting with Mr. Robinson, of the Crown Office)—That part of the rule cannot be introduced, as the defendant is not in custody. In order to do that, he must surrender. If he were in custody already, it might be made part of the rule that he should be bailed before a magistrate in the country. If he does not surrender, what is to become of him between the time of the Court taking into consideration the depositions and inquisition and the time of bailing him? This might enable him to try the experiment of having the inquisition and depositions examined by the Court: then, if the Court should be of opinion that he ought to be bailed, he would give bail; but, if the Court should be of opinion that he ought not to be bailed, then of course he would not come into custody. You may take the rule for the certiorari, but without the introduction of the term you mentioned.

Rule accordingly.

1836.

GRIFFITHS and Others v. ANTHONY and Wife.

(Before the Four Judges.)

CHILTON shewed cause against a rule nisi obtained by *V. Williams*, for a prohibition to be directed to the Consistory Court of the Bishop of St. David's, prohibiting them from further proceeding in the above suit. From the affidavits it appeared, that the female respondent, Margaret Anthony, on the 4th of June, 1819, took out letters of administration to her father's will, and afterwards married the male respondent. In the month of January, 1835, the two respondents were cited to the Consistory Court of the Bishop of St. David's, at Carmarthen, to exhibit and bring into the registry of the said Court a true and perfect inventory and schedule of the testator's personal property, at the instance of certain legatees named in the will. The respondents accordingly appeared, and on the 15th of April last, exhibited in the registry of the Consistory Court an inventory of all the effects of the testator bequeathed to the female respondent, subject to the several legacies therein mentioned, and also an account of payments and disbursements made by her on account of the testator's estate. On the 22nd of June last the legatees, David Griffiths and others, as parties agent in the suit, filed certain exceptions to the inventory and account. The respondents filed their answer to the exceptions, and the cause, having been set down, came on for hearing before the presiding judge on the 9th of December last. The further hearing of the cause was adjourned until the 21st of December, in order to examine witnesses and take evidence as to the emblements belonging to the testator. Witnesses were examined, and the Court ultimately pronounced a decree declaring the inventory and account to be false, imperfect, and fraudulent; and required the respondents to pay the costs of the proceedings in the case.

If a Consistory Court proceeds to hear exceptions to an inventory, exhibited by an executor, a prohibition lies.

1836.
—
GRIFFITHS
v.
ANTHONY.

It also appeared that the evidence had been taken by consent *viva voce*; and that the respondents had applied for permission to amend their inventory. *Chilton* admitted, that, if the case of *Henderson v. French* ^(a) was to be considered as unimpeached, it was difficult to answer the present application. That was a rule for a prohibition to the Consistory Court of Carlisle, enjoining it not to proceed to hear exceptions to an inventory exhibited by the executrix. The Court was of opinion, that, as the statute of 21 Hen. 8, c. 5, s. 4, directed the executor, for the security of creditors and legatees, to make an inventory, to be delivered to the bishop or ordinary, and that no bishop or ordinary should, under pain of 10*l.*, refuse to take such inventory; his office was merely ministerial to receive it when tendered: if the statute had intended more, it would have so said. But although this case had been so decided, a different practice prevailed in the Ecclesiastical Courts; for, it was stated in Mr. Williams's able book on executors ^(b), "Notwithstanding these decisions of the Court of King's Bench, it has always been, and still continues, the practice of the Prerogative Court of Canterbury to entertain objections to inventories." For this the learned author cited a variety of authorities in a note. But he submitted that the respondents had waived the objection now sought to be taken, by applying for leave to amend their inventory. The present rule ought therefore to be discharged.

V. Williams, in support of the rule, was stopped by the Court.

LORD DENMAN, C. J.—It appears to me that, on the authority of the case of *Henderson v. French*, the present rule ought to be made absolute. I also think that

(a) 5 Mau. & Sel. 406.

(b) Vol. 2, p. 646.

nothing which has taken place amounts to a waiver of the objection to the proceedings of the Ecclesiastical Court.

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 GRIFFITHS
 &
 ANTHONY.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule absolute.

See 1 Will. 4, c. 21, ss. 1 & 2, for in prohibition, and 2 Dowling's the modern mode of proceeding Statutes, p. 37.

DOE *d.* FINCH *v.* ROE.

TOMLINSON applied for judgment against the casual ejector. The affidavit on which he moved stated that the declaration had been left with a servant at the premises in question, and that the wife of the tenant had acknowledged the receipt of it on the day before term. The affidavit went on to state, that, since the commencement of the term, the husband had acknowledged the receipt of the declaration, but had declined stating when it had come to his hands.

An acknowledgment by a tenant in possession after the commencement of the term, that the declaration has come to his hands, is not sufficient even for a rule nisi for judgment against the casual ejector, unless the acknowledgment is that he received it before term, although the wife acknowledges that it came to her hands on the day before term.

LITTLEDALE, J.—I think that will not do. You must prove your case.

Tomlinson then applied for a rule nisi, on the authority of *Doe v. Roe* (a), where the service of the declaration was by leaving it with the daughter of the tenant in possession, the latter being confined by indisposition, it being sworn that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign day of the term.

(a) 1 D. & R. 12.

1896.

DOE
d.
FINCH
v.
ROE.

The Court there held that service to be sufficient for a rule nisi for judgment against the casual ejector.

LITTLEDALE, J.—I think you are not even entitled to a rule nisi.

Rule refused.

CLIFFORD v. PARKER.

The Court will not compel an attorney to answer the matters in the affidavit, merely because he has hired insufficient bail to justify in an action.

BUTT moved for a rule to shew cause why the rule for the allowance of the bail in this case should not be set aside, and a new writ of *capias* issue, on the ground of the insufficiency of the bail, and that the attorney should answer the matters in the affidavit. The reason for engrafting the last term on the rule was, that he had hired the bail in question with a sum of 7*l.* to justify.

LITTLEDALE, J.—I do not think that is sufficient to authorize me in directing the attorney to answer the matters in the affidavit. As to that part, therefore, no rule can be granted.

Rule refused.

DOE d. JONES v. ROE.

In order to obtain judgment against the casual ejector, it is necessary to swear to a service on the "tenant in possession;" it is not sufficient to swear to service on a person who appears from facts stated in the affidavit, to be in point of law the tenant in possession.

BALL moved for judgment against the casual ejector. The affidavit on which his application was founded did not state in terms that the person on whom the declaration had been served, was "tenant in possession," but it disclosed a number of facts which clearly shewed that the person on whom the service had been effected was in reality the tenant in possession. The lessor of the plaintiff would be in some difficulty in proceeding in the present case, if it were necessary to swear to a service on the "tenant in possession."

LITTLEDALE, J.—(After consulting with Mr. Hill, the clerk of the rules). The affidavit is not sufficient. You must swear to a service on the “tenant in possession,” or you cannot proceed.

Rule refused.

1836.

DOE
d.
JONES
v.
ROE.

EDWARDS v. COLLINS.

COWLING shewed cause against a rule nisi obtained by *Ball*, calling on the plaintiff to shew cause why the copy of the writ of summons in this case should not be set aside. The objection to the copy was, that it was tested in the 3rd year of the present King's reign; and as by the 10th section of the Uniformity of Process Act, the writ was not in force for more than four calendar months, and as the copy ought to coincide with the original, it was to be considered as a nullity. The original writ, however, was quite regular, and therefore the only question was upon the copy. It was submitted that the objection which appeared on the copy only amounted to an irregularity according to the provisions of 10 Reg. Gen. M. T. 3 Will. 4 (a). That rule ordered, “that, if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any judge.” Being an irregularity only, it was necessary that the defendant should come within a reasonable time to make his application to the Court, for the purpose of setting aside the copy. In the present case, the copy was served on the 27th of October; and the eight

A mistake in the year in the teste of the copy of a writ of summons, the writ itself being right, is a mere irregularity, which is waived if the defendant does not come to the Court before the time for entering an appearance has elapsed.

(a) Ante, Vol. 1, p. 473.

1836.
—
EDWARDS
v.
COLLINS.

days, within which an appearance was to be entered, consequently expired on the 3rd November. Here, the affidavit was not sworn until the 4th of that month. The general rule was, that the defendant must come to the Court before the time for appearing had expired. In the case of *Tyler v. Green* (a) the writ was served on the 25th of October. An application was made on the 3rd of November to set aside the service for irregularity, the 2nd being a Sunday; and the Court of Exchequer was of opinion that the application was out of time, and that it should have been made on the 1st. Under these circumstances, on the authority of the rule of Court (b) which required applications of this description to be made within a reasonable time, and of the case cited, it was submitted that the present rule ought to be discharged with costs.

Ball, in support of the rule, submitted that the copy of the writ of summons in this case served on the defendant was a mere nullity, and therefore the defendant had not been guilty of laches in not coming earlier to the Court. By the Uniformity of Process Act, section 1, the writ of summons was required to be in the form contained in the schedule. If the form was not complied with strictly, the writ was a nullity. A portion of the form was the year of the king's reign in which the writ was issued. The copy of the summons must of course be subject to the same form. If, therefore, the copy were wrong, as that was all the defendant saw, the writ was wrong. But here the copy was tested in the third year of the present King's reign; and by section 10 of the Uniformity of Process Act, no writ issued by the authority of that act was in force for more than four calendar months from the

(a) Ante, Vol. 3, p. 439.

(b) 1 Reg. Gen. H. T. 2 Will. 4, s. 33, ante, Vol. 1, p. 187.

day of the date thereof, including the day of such date. But here, the writ appeared by the copy to have been issued much more than four calendar months; and, being no longer in force, was therefore a mere nullity. It could not consequently be waived by mere delay. He cited *Garratt v. Hooper* (a), and *Roberts v. Spurr* (b).

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EDWARDS
v.
COLLINS.

LITTLEDALE, J.—I cannot hold this to be a nullity, because there is this mistake in the copy of the process—the writ itself appears to be right. The defect only amounts to a mere irregularity. That irregularity has been waived by the defendant's laches. The present rule must be discharged, and with costs.

Rule discharged with costs.

(a) Ante, Vol. 1, p. 27.

(b) Ante, Vol. 3, p. 551.

NOWELL v. UNDERWOOD.

DOWLING moved to increase issues against the sheriff of Lincoln. The affidavit on which he moved stated, that a writ of testatum fieri facias had issued to the late sheriff of Lincoln, requiring him to levy 22*l.* 8*s.* for debt, and 30*l.* 17*s.* for damages and costs recovered against the defendant. On the 27th of January the sheriff returned that he had seized the defendant's goods; that he had sold to the amount of 23*l.*, and that the rest remained in his hands for want of buyers. In Trinity Term last a writ of distringas issued to the new sheriff, requiring him to distrain the late sheriff that he sell the goods now in his hands under the testatum fieri facias. To this the present sheriff returned, that he had distrained him to the

Where a sheriff does not sell goods seized by him under a test. fi. fa. before he leaves office, and the new sheriff distrains him that he sell the goods seized, on a motion afterwards to increase issues, the Court will allow him to be distrained for the amount of the debt directed to be levied, and a further sum to cover the plaintiff's

costs consequent on the delay, as well as those of the application. The rule for this purpose is absolute in the first instance.

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value of 40*s.* The object of the present application was, that the present sheriff might distrain the late sheriff for the full amount of the debt which he was commanded to levy, together with the costs and damages; and also a further sum for the expenses to which the plaintiff had been put in consequence of the misconduct of the late sheriff, and also for the costs of this application. He cited *Philips v. Morgan* (a), where the Court had granted a similar motion on the authority of *Raban v. Plaistow* (b).

LITTLEDALE, J.—You may increase the issues to 70*l.*

Dowling submitted that the rule ought to be absolute in the first instance.

LITTLEDALE, J. (after consulting with Mr. Hill, the clerk of the rules.)—The rule is absolute in the first instance.

Rule granted.

(a) 4 B. & Al. 652.

(b) 5 Bur. 2726.

CRANCH v. TREGONING and Others.

The Court in banc has no jurisdiction to amend an order of Nisi Prius until it has been made a rule of Court.

SHEE applied for leave to amend an order made by Lord *Abinger*, C. B., at the last Assizes for the county of Surrey, for the amendment of certain pleas pleaded by the defendant. The mistake in the order had arisen in the hurry of Nisi Prius. The order of the Lord Chief Baron had not, however, been made a rule of Court.

LITTLEDALE, J.—You must have the order of Nisi Prius made a rule of Court. Without that proceeding, this Court has no jurisdiction.

Rule refused.

Ex parte BLUNT.

ERLE applied on the first day of term for leave to introduce the name of a gentleman named Blunt into the Master's list of persons seeking to be admitted pursuant to 5 Reg. Gen. H. T. 6 Will. 4(a). By that rule it was ordered, "that three days at the least before the commencement of the term next preceding that in which any person, not before admitted, shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts, as now required, the usual written notices." From these the Master is to make a list, and affix the same, on the first day of term, in some conspicuous place within or near to and on the outside of each Court. This being the first day of term, if the name were introduced into the list put up by the Master, all the notice contemplated by the rule would be given to the public. The reason of the notices not having been served in due time before the term was, the accidental neglect of the agent who had been directed to take the necessary steps for the applicant's admission as an attorney.

Under special circumstances the Court will allow the name of a person applying for admission as an attorney to be introduced into the Master's list on the first day of term, although the notices have not been given "three days at the least before the commencement of the term," pursuant to 5 Reg. Gen. H. T. 6 Will. 4.

LITTLEDALE, J.—I think the name may be introduced into the list, as it does not appear that the omission arose from the applicant's own neglect, and as at present the profession is not thoroughly acquainted with these new rules as to the admission of attornies.

Application granted.

J. Jervis and *Wightman* made similar applications on the same day, and with like success.

(a) Ante, Vol. 4, p. 554.

1836.

BYLES v. WALTER.

A summons for time to plead, returnable at ten o'clock in the morning in term time, at chambers, operates as a stay of the plaintiff's proceedings, although it is well known that a judge does not attend at chambers at that hour.

BUSBY shewed cause against a rule nisi obtained by *Platt*, for setting aside an interlocutory judgment signed by the plaintiff. It appeared by the affidavits that the time for pleading expired on the 3rd of November. On that day the defendant took out a summons for further time to plead, and made it returnable at ten o'clock on the following morning, at chambers. At eleven o'clock, when the judgment office opened, the plaintiff (who had attended at the judge's chambers at ten o'clock, and found that no judge was there or expected to be there) signed interlocutory judgment for want of a plea. The question, therefore, was, whether such a summons, returnable at such an hour in term time, amounted to a stay of proceedings. If it did, the judgment was irregular; if it did not, the judgment was regular. *Busby* contended that such a summons, so returnable, was not a stay of proceedings. It was a mere trick on the part of the attorney. He admitted that if a summons were made returnable in *vacation* at the time the judgment office opens, on the day after the time for pleading expires, it would amount to a stay of proceedings, as in the case of *Wells v. Secret (a)*. But the reason why, in that case, it operates as a stay of proceedings is, that in *vacation* a judge usually attends at chambers at the same hour as the judgment office opens; but in the present case the summons was made returnable in *term*, at an hour in the day when it was notorious that no judge ever attended at chambers, and when in fact no judge did attend, or was expected to attend. The summons might just as well have been made returnable at five in the morning or ten at night. The judges' clerks, by whom these summonses are issued unknown to the judges, have no power to grant such a summons as this. If it had been made returnable at Westmins-

(a) Ante, Vol. 2, p. 447.

ter, the case might have been different. But with such a return it was a fraud and a mere nullity, and the plaintiff was not bound to take notice of it. It could not therefore operate as a stay of proceedings. The judgment, consequently, had not been signed too soon, and was perfectly regular.

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Platt, in support of the rule, contended that the summons did operate as a stay of proceedings, if it was made returnable before or at the opening of the judgment office. The fact of the hour at which it was made returnable being an unusual one did not prevent its operating as a stay of proceedings. The judge could make the summons returnable at any hour he chose; and if made returnable before or at the time for signing judgment, it was obligatory on the plaintiff. There was nothing extraordinary that a variation should exist in the hour of making a summons returnable. According to the old practice, summonses were made returnable in term at six o'clock in the evening, because it was then supposed that a judge had no power at chambers while the Court was sitting. The circumstance, therefore, of its being made returnable at ten in the morning did not interfere with its validity. It consequently operated as a stay of proceedings; and the judgment signed, while the plaintiff's proceedings were stayed, must necessarily be irregular.

COLERIDGE, J.—The question is, whether the plaintiff had a right to treat the summons as a nullity. I think he had no such right. The summons may have been made returnable at a time when it was a matter of notoriety that the judge was not at chambers; yet, on the face of it, the summons appeared to have been issued by the authority of the judge, and therefore I think it better to hold that it should not be treated as a nullity. On that ground the judgment must be set aside, and with costs.

Rule absolute, with costs.

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If an order for an issue is made by consent at chambers by a single Judge for the relief of the sheriff under s. 6 of the Interpleader Act, it is necessary for the successful party to come to the Court to obtain an order for his costs.

MATTHEWS v. SIMS.

BUSBY moved for the costs of an issue which had been tried to determine a question as to the ownership of certain property seized by the sheriff, and in which the plaintiff had been successful. After the sheriff had seized, he applied for relief under s. 6 of the 1 & 2 Will. 4, c. 58 (the Interpleader Act). It had been determined, in various cases, that a Judge at chambers had not power to make an order for the sheriff's relief, but that the Court alone had jurisdiction for that purpose. The execution creditor, and the claimant, however, went before a Judge at chambers, and he by consent made an order directing the issue in question. On it, the plaintiff succeeded; and the difficulty now was, whether, as the Court was by the above-mentioned section empowered to exercise its discretion with respect to proceedings under it, the present case came within its meaning; and consequently, whether the plaintiff ought to apply to the Court for an order with respect to his costs, or to tax them at once like a successful party in any other proceeding.

LITTLEDALE, J., feeling some doubt on the point, referred the question to the full Court.

Busby afterwards made his application to the four Judges.

THE COURT was of opinion, that, as the defendant had consented to the order made by the Judge at chambers, the case was within the act, and it was therefore necessary to come to the Court for the purpose of obtaining an order to give the successful party his costs.

Rule granted.

1836.

RANGER v. BLIGH.

CHADWICK JONES moved for a rule nisi, for judgment as in case of a nonsuit. Issue had been joined in the month of July last, and notice of trial given for the first sitting in Michaelmas Term. This notice was not countermanded; but, on the 29th of October, a fresh notice was given for the sittings after Michaelmas Term. The plaintiff, of course, did not proceed to trial pursuant to his first notice. Having thus given a notice for trial, and not proceeded pursuant to it, it was submitted that the defendant was entitled to judgment as in case of a nonsuit.

LITTLEDALE, J.—I will consider the case, as the point is somewhat new.

Cur. adv. vult.

LITTLEDALE, J.—I think the defendant is not entitled to judgment as in case of a nonsuit. The plaintiff was not bound to proceed to trial before the sittings after Michaelmas Term. His second notice of trial was therefore a good one. It does not appear to me that it was necessary he should countermand his first notice previous to giving his second. The case of *Tyte v. Stevenson* (a), the marginal note of which is "Continuance of a void notice of trial may operate as a new notice, if given within regular time," is an authority in point.

Rule refused.

(a) 2 W. Blacks. 1298.

If a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the Court, and he afterwards gives another notice of trial for a later sitting, but which is still within due time, the defendant is not entitled to judgment as in case of a nonsuit, although he has not proceeded to trial under his first notice, nor countermanded it.

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The Court of K. B. has no jurisdiction over an attorney of the Great Sessions of Wales for misconduct while acting in that character, notwithstanding the provisions of the 11 Geo. 4 & 1 Will. 4, c. 70, and his having become an attorney of the K. B.

In the Matter of JOHN WILLIAMS.

V. WILLIAMS shewed cause against a rule nisi obtained by *W. H. Watson*, requiring an attorney, named Williams, to answer the matters in the affidavit. A preliminary objection was taken that the Court had no jurisdiction over Mr. Williams, since, at the time of the transaction on which the present application was founded, he was not an attorney of the Court of King's Bench, but merely an attorney of the Court of Great Sessions in Wales. It was true that, at the present moment, he was an attorney of the Court of King's Bench; but that circumstance could not relate back so as to give this Court jurisdiction over him for conduct which had taken place while he was an attorney of another Court.

W. H. Watson, in support of the rule, contended that, by the operation of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 17, Mr. Williams must be considered as subject to the jurisdiction of the Courts of Westminster. By section 14 of that statute, it was provided, that all the proceedings before the Courts of Great Sessions, "if in equity, shall be transferred with all the proceedings thereon to his Majesty's Court of Chancery, or Court of Exchequer, as the plaintiff, or (in default of his making choice before the last day of Michaelmas Term) as any defendant shall think fit; and, if in law, to the Court of Exchequer, there to be dealt with, and decided according to the practice of those Courts respectively, or of the Court from whence the same shall be transferred, according to the discretion of the Court to which the same shall be transferred; which Court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of this act by the Court from whence such suit shall be removed."

Then, by section 17 of the same act, it was provided, "that all attornies and solicitors now actually admitted, and practising in any of the said Courts of Sessions or Great Sessions, may be admitted as attornies of the said Courts at Westminster, in like manner as is now or may be hereafter prescribed for the admission of other persons as attornies therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as shall, together with such latter sum, amount to the full duty required upon admission of attornies in the said Courts at Westminster." In the present case, Mr. Williams had availed himself of the latter section, and had become an attorney of the Courts at Westminster. As therefore the business in question had been done while Mr. Williams was an attorney of the Court of Great Sessions, and all the business of that Court had been transferred to the Courts at Westminster, and Mr. Williams had become an attorney of those Courts, he had brought himself within their jurisdiction. The objection therefore taken on the other side was completely answered.

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LITTLEDALE, J.—Mr. Williams was not an officer of this Court at the time of the transaction in which it is supposed he has been guilty of some misconduct. This Court, therefore, has no jurisdiction over him. As to the fact of the business of the Court of Great Sessions having been transferred to Westminster, that cannot be used as an argument here, because it was transferred to the Court of Exchequer. But, if it had been transferred to this Court, I do not think that would have made any difference. Then the circumstance of his admission as an attorney of this Court cannot give it jurisdiction over him in respect of his conduct existing previous to his admission; whatever jurisdiction the Court of Great Sessions might have had previous to its abolition. The present rule, therefore, must be discharged, and with costs.

Rule discharged with costs.

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The KING *v.* The Sheriff of STAFFORD.

It is sufficient in an affidavit of service of a rule to swear to the service of "a true," without adding the word "copy."

BUSBY moved to discharge a rule for an attachment against the sheriff, on the ground of a defect in the affidavit of service of the side-bar rule. The affidavit stated that the deponent had served the under-sheriff "with a true," without going on to state "copy of the rule hereunto annexed:" the affidavit, however, went on to state that the deponent at the same time "shewed him the original of the said rule." The affidavit of service, it was submitted, could not be considered as sufficient, since in the event of an indictment for perjury, it would be difficult to assign it on such an affidavit.

LITTLEDALE, J.—I think the meaning of the affidavit must be taken to be, that the deponent has sworn to the service of "a true copy," although the word "copy" is not introduced in the affidavit; and I also think that an indictment for perjury might be sustained upon it. I cannot therefore grant you the rule prayed.

Rule refused.

The KING *v.* SHILLIBEER and Others.

(*Before the Four Judges.*)

A reference of an indictment for conspiracy, together with other matters in difference, is not within the meaning of the 3 & 4 Will. 4, c. 42, s. 39, and therefore the parties may revoke the authority of the arbitrator, without the leave of the Court or a Judge.

BOMPAS, Serjt., and *Platt*, shewed cause against a rule for setting aside an order of reference, on the ground that the authority of the arbitrator had been revoked by the defendants. It was an indictment for a conspiracy, and came on for trial in the year 1834, before Lord *Denman*, C. J. After the case had proceeded to a certain

therefore the parties may revoke the authority of the arbitrator, without the leave of the Court or a Judge.

extent, the Chief Justice suggested that it should be referred to an arbitrator. The parties adopted the suggestion, and the indictment, with certain matters in difference, was referred to a gentleman at the bar. He held a meeting under the order of reference; but almost immediately after the parties had appeared before him, the defendants refused to proceed in the reference, and both verbally and in writing revoked the authority of the arbitrator. The learned gentleman to whom the case was referred discontinued his proceedings under the order, for the purpose of enabling the parties to take the opinion of the Court of King's Bench as to the power of parties, of their own accord, to revoke the authority of an arbitrator, since the passing of the 3 & 4 Will. 4, c. 42, s. 39. The words of that section were—"The power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court or Judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award." According to the fair construction of this section, *Bompas*, Serjt., contended that the parties had no power to revoke the authority of the arbitrator. In the present case an order of Nisi Prius had been made, containing the usual clause, that it might be made a rule

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of Court. This was therefore, in terms, one of those instances to which the statute applied. It was true, that in the commencement of the section, the word "action" was mentioned; but the immediately subsequent words were much more extensive: consequently, the circumstance of this reference being made in a matter which had formed the subject of an indictment, could not take it out of the operation of the statute. In the following section, the words were still more general. But, if any doubt could exist as to the meaning of the statute, inasmuch as this was a remedial act, a liberal construction ought to be put upon it. The object of the Legislature was to extend the remedy of arbitration by preventing parties from capriciously revoking the authority of arbitrators, after great inconvenience and expense had been incurred. It was, therefore, contended on these grounds, that the defendants could not revoke the authority of the arbitrator without obtaining leave for that purpose from the Court or a Judge.

The Attorney-General, Humfrey, and Knowles, supported the rule.—They submitted that it was quite clear a party had power at common law to revoke the authority of an arbitrator. The question then was, whether the statute had deprived him of that power. Under any circumstances, however, supposing the power to exist, it would not be necessary for the revocation to be made by an instrument under seal.

LORD DENMAN, C. J.—I do not think any such instrument would be necessary, if it appears that the party revoking has power to revoke.

The Attorney-General.—Then, on the clear construction of the act of Parliament, as it evidently applies by its language to actions and other civil proceedings, and not

to indictments or other criminal proceedings, the parties have not been deprived of their common law right, and therefore they have power to revoke the authority of the arbitrator.

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LORD DENMAN, C. J.—We are of opinion that this is not a case within the act. If it is not, the parties are not to be deprived of their common law right, to revoke the authority of the arbitrator. We think that the act does not apply to a reference of an indictment. The act applies, in section thirty-nine, to certain specific things—that is to say, to rules of Court, Judges' orders, orders of *Nisi Prius* in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of Court. These words evidently apply only to civil proceedings. The present agreement to refer, although made in pursuance of an order at *Nisi Prius*, is not such an agreement as was contemplated by the Legislature in this clause of the act of Parliament.

PATTESON, J.—The thirty-ninth section clearly applies to actions, and not to indictments. The whole act clearly contemplates civil cases only. It first mentions actions, and then agreements to refer in pursuance of submissions, afterwards to be made rules of Court; thereby only providing for civil cases. The present case being a criminal proceeding, does not come within the meaning of the act.

WILLIAMS, J., concurred.

COLERIDGE, J.—This case is neither of those contemplated by the act of Parliament.

Rule discharged.

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The KING v. Fox.

The writ of certiorari at the instance of a defendant is taken away by the 25 Geo. 2, c. 36, s. 10, in the case of an indictment for keeping a gaming-house.

SIR F. POLLOCK, with whom was *Barstow*, applied for a rule to shew cause why a writ of certiorari should not issue for the purpose of removing an indictment for keeping a gaming-house from the Quarter Sessions for the county of Middlesex, at which it had been found. The application was made on the part of the defendant, and the question was, whether, since the 25 Geo. 2, c. 36, s. 10, an indictment for keeping a gaming-house could be removed from the Quarter Sessions at which the bill had been found. The words of the section were, "that no indictment which shall at any time after the said 1st day of June be preferred against any person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of certiorari into any other Court; but such indictment shall be heard and finally determined at the same General or Quarter Session or Assizes where such indictment shall have been preferred, unless the Court shall think proper, upon cause shewn, to adjourn the same, any such writ or allowance thereof notwithstanding." The language of the section was general, and it was therefore immaterial at whose instance the application was made, whether at the instance of the prosecutor or the defendant.

LITLEDALE, J. (after consulting with Mr. Robinson of the Crown Office).—In point of practice, that act has been considered as only giving power to the Court to grant the writ of certiorari at the instance of the prosecutor. My opinion is, that the Court cannot grant it, at the instance of the defendant. You may, however, take a rule nisi.

Rule nisi granted.

THE rule afterwards came on for discussion before the full Court, when Sir *F. Pollock* admitted that, on a fresh perusal of the act of Parliament, it was quite clear that he could not sustain his rule. The writ of certiorari was evidently taken away by the clause of the act in question, where the application was made at the instance of a defendant.

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Rule discharged.

— *See Griffin v. Gilbert 7 C.B. 101.*

SALISBURY v. SWEETHEART.

CHADWICK JONES moved to make a rule to compute absolute, on an affidavit of service. The deponent, on whose affidavit he moved, swore to a service of the rule nisi "on the landlady of the house at which the defendant lodged." The person on whom the service had been effected must clearly be taken, in this instance, to be the agent of the defendant.

Service of a rule to compute "on the landlady of the house at which the defendant lodges," is insufficient.

LITTLEDALE, J.—I do not think that is a sufficient service; because, although she is the landlady of the house, it by no means follows that she is an agent for the purpose of receiving papers for her lodgers. If there were anything to shew that she was such an agent, the case would be different.

Rule refused.

DAY v. GREENWAY and Another.

MARTIN moved to stay regular proceedings on a bail-bond. The only question in the case was, whether the motion ought to be made on payment of costs, or not.

1 Reg. Gen. H. T., 2 W. 4, s. 14, as to the transmission of the bail-piece, in the case of

country bail, does not apply where bail has been put in in the country to set aside regular proceedings on the bail-bond.

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By 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 14 (*a*), it is ordered, that "in the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and, in that case, within fifteen days after the taking thereof." In the present instance bail had been taken in the country, the defendant residing within forty miles of London, and the bail-piece transmitted within eight days after it was taken. The question, therefore, was, whether the present application to stay regular proceedings on the bail-bond ought to be made on payment of costs or not.

LITLEDAL, J. (after consulting with Master Bunce)—That rule does not affect the time allowed for putting in bail, where an assignment of the bail-bond has been taken. The time for putting in bail regularly must be according to the exigency of the *capias*. The application ought to be made on payment of costs.

Rule accordingly.

(*a*) Ante, Vol. I, p. 185.

LYDAL v. BIDDLE.

Where a plaintiff in an issue directed under the Interpleader Act does not proceed to the trial of it, the Court will not permit another person's name to be substituted, without making the originally appointed plaintiff a party to the rule.

R. V. RICHARDS applied for leave to substitute the name of a person named Webb, for that of Lydal, the plaintiff in this cause. It was an issue directed under the Interpleader Act, to try a certain question between the parties claiming the property in dispute, and the Court ordered the claimant Lydal to be made plaintiff. Since then, he had refused to proceed with the trial of the issue; and therefore the present application was made to substitute the name of Webb, who was another claimant, in order that the question might be determined between the parties. It was proposed at once to substitute the name of Webb, without making him a party to the rule.

COLERIDGE, J.—You cannot proceed to substitute his name for that of Lydal, without making the latter a party to the rule. He may come here and deny the fact of his having refused to proceed, and give some excuse for not proceeding. You may have the rule for effecting the substitution, but Lydal must be made a party to it.

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Rule nisi accordingly.

The KING v. The Sheriff of MIDDLESEX.

R. v. RICHARDS moved to set aside an attachment against the sheriff for not bringing in the body. The defendant had been taken in vacation, and the sheriff being ordered to return the writ, he returned cepi corpus. He was then ordered to bring in the body. He did not comply with the exigency of this order in due time; but on the 4th of October the defendant was rendered. The plaintiff afterwards made the Judge's orders rules of Court, and on the 12th of November, he applied for an attachment, to which he was entitled under Reg. Gen. Hilary Term, 3 Will. 4 (a); but although he was entitled to his attachment according to the provisions of that rule, it was submitted, that he ought to come to the Court promptly in the term following the vacation in which the neglect, which constituted the contempt, was committed. The question was, therefore, whether, under these circumstances, the application to set aside the attachment might not be made without payment of costs.

Semble, that where a plaintiff is entitled to an attachment, pursuant to Reg. Gen. H. T., 3 Will. 4, against the sheriff for not obeying a Judge's order in vacation to bring in the body, although the defendant is afterwards rendered in vacation, he is bound to apply for the attachment promptly in the following term.

COLERIDGE, J.—I think the plaintiff ought to come promptly to the Court in the term following the vacation in which the contempt is committed, in order to obtain his

(a) Ante, Vol. 1, p. 731.

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attachment. You may therefore move to set it aside without making the payment of costs a part of the rule.

Rule accordingly.

FELL v. TYNE.

A notice of trial in due time, according to the practice of the Court, is regular, although a previous notice has been given which is void, and has not been countermanded.

THEOBALD shewed cause against a rule nisi obtained by *Steer* for setting aside the verdict found for the plaintiff in this case, and compelling the plaintiff to pay the costs of the application. The ground on which the rule had been obtained was an alleged irregularity in the notice of trial. Issue was joined in Easter Term, and notice of trial was given for the adjournment day after Easter Term. By the practice of the Court, however, there was no adjournment day after Easter Term. The plaintiff, of course, did not proceed to trial, but, without countermanding the notice already given, gave a fresh notice for the 20th June, which was the adjournment day after Trinity Term. The plaintiff proceeded to trial on this notice, and obtained a verdict, the defendant not appearing. The defendant obtained a rule on the last day of Trinity Term to set aside the notice of trial and all subsequent proceedings, on the ground that the plaintiff was irregular in giving the second notice of trial, without countermanding the former. It was contended, however, that no countermand was necessary, as the second notice was given as early as was necessary, according to the practice of the Court. In support of this view, *Theobald* cited *Tyte v. Stevenson* (a). In that case, a four days' notice of trial had been given, when the defendant was entitled to eight days' notice, but the plaintiff afterwards gave an eight days' notice within due time, according to the practice of the Court. There, it was held, that the second notice was a good continuance of the first, so as to operate as a good new notice:

(a) 2 W. Black. 1298.

The language of Mr. Justice Blackstone was very important. His Lordship said, "there is no settled precise form of notice required; it is sufficient if it apprizes the defendant with certainty that the plaintiff means to proceed to trial. It is indifferent whether he says, I *renew*, or I *continue* the former notice, provided there be a sufficient time, according to the rules of the Court. I therefore think this is in itself a new and a good notice." On the principle and authority of that case, the plaintiff's proceedings were regular.

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Steer appeared to support the rule.

LITLEDALE, J.—I think, on the principle of the case cited in argument, the plaintiff was regular in proceeding to trial on the second notice. It having been given in due time for proceeding to trial, according to the practice of the Court, it must be considered as a fresh notice given in due time. No countermand of the former notice was necessary, as that must be considered a nullity. The plaintiff was therefore regular in proceeding to trial on that notice. The present rule must consequently be discharged.

It was afterwards made absolute for a new trial on certain terms agreed between the parties.

Rule accordingly (a).

(a) The defendant did not comply with the terms, and the plaintiff had judgment.

SEATON v. HEAP.

ROBINSON shewed cause against a rule nisi obtained by *W. H. Watson* for setting aside a writ of *seire facias*, on the ground that it was tested in vacation instead of term time. He admitted that the objection was a fatal one, unless the Court should be of opinion that this writ came within the meaning of the Uniformity of Process Act,

A writ of *sci fa.* cannot be tested in vacation, notwithstanding the provisions of sect. 12 of the Uniformity of Process Act.

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which, by s. 12, allowed all writs issued under the authority of that act to be tested on the day on which they were issued.

W. H. Watson, in support of the rule, was stopped by the Court.

LITTLEDALE, J.—I do not think the writ of scire facias does come within the meaning of the Uniformity of Process Act, as the section cited only applies to writs issued by virtue of that act, and certainly writs of scire facias are not so issued. The present rule must be made absolute for setting aside the writ.

Rule absolute.

HITCHCOCK v. SMITH.

Service of a rule to compute "on a workman on the defendant's premises," is insufficient.

CHADWICK JONES moved to make a rule to compute absolute, on affidavit of service. The affidavit on which he moved stated a service of the rule nisi to have been effected "on a workman on the premises of the defendant." This, he submitted, was sufficient service of a rule to compute. Such very strict service of rules to compute was not required, as in other cases.

LITTLEDALE, J.—The service disclosed in the affidavit, on which you move, is not sufficient. There is nothing to shew that there was any connexion between the workman who has been served and the defendant. For any thing that appears in the affidavit, he may have been a mere stranger, who had come on the premises for a temporary purpose.

Rule refused.

1836.

REX v. TEMPLAR and Others.

(Before the Four Judges).

CHADWICK JONES moved for a rule to shew cause why a writ of certiorari should not issue to remove an indictment for a conspiracy from the Central Criminal Court. The indictment contained five counts, and charged the defendants with a conspiracy to obtain a sum of 45*l.* from the prosecutor, by selling him an unsound horse for a sound one. From the nature of the indictment, it was clear, on the authority of *Rex v. Pywell and others* (a), where it was held that an indictment will not lie for a deceitful representation and warranty of the soundness of a horse, that the present indictment could not be sustained. Under these circumstances, difficulties in point of law might arise, which would be more properly submitted to a superior tribunal. The defendants were also desirous of availing themselves of the assistance of some of His Majesty's counsel, and of having the indictment tried by a special jury.

The fact of an indictment being bad in point of law, is not a sufficient ground for granting a writ of certiorari to remove it from the Central Criminal Court.

LORD DENMAN, C. J.—We do not think that the circumstance of the indictment being a bad one is a sufficient ground for removing it from the Central Criminal Court. If it is bad, that Court can deal with it as well as this. We are not desirous of encouraging applications of this sort.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule refused.

(a) 1 Stark. 402.

1836.

PHILLIPS v. CHAPMAN.

It is regular to serve a rule to change the venue and deliver a plea at the same time, notwithstanding the new rules of pleading, although the issue which must be joined between the parties will prevent the plaintiff from giving an undertaking to give material evidence in the original county, or from fulfilling it.

KNOWLES shewed cause against a rule nisi obtained by *R. V. Richards* for discharging a rule for changing the venue from Middlesex to Surrey. It was an action for an escape, at the instance of the plaintiff, against the Marshal of the King's Bench. The only plea which the defendant had put upon the record was, that the prisoner did not escape. The defendant having obtained a rule for changing the venue on the common affidavit, it was served at the same time as the plea was delivered. It was objected on behalf of the plaintiff, that it was irregular to serve the rule and deliver the plea at the same time. This was, however, the practice which had for many years prevailed, in the Court of King's Bench, as well as the other Courts. The only authority in support of the objection was, a case which it was said might be found in 2 Strange.

LITLEDALE, J.—I certainly should not attach much weight to a case in Strange, as to a point of practice.

R. V. Richards, in support of the rule, contended that, whatever might have been the practice in such cases before the introduction of the new rules of pleading, since their introduction a different practice ought to prevail. Those rules required the denial of a single allegation in the declaration, and therefore both parties were in a different situation from that in which they stood when the defendant might have pleaded the general issue. Thus, in the present case, the defendant having in pursuance of the new rules pleaded that the prisoner did not escape, the issue was so far narrowed, that the plaintiff being obliged to take issue upon the plea, and thus tacitly ad-

mit the cause of action to have arisen in the county of Surrey, the King's Bench prison being situate in that county, he would not be able to bring back the venue on the ordinary undertaking to give material evidence in the county of Middlesex. This difficulty arose from the practice of serving the rule to change the venue and delivering the plea at one and the same time. If the rule to change the venue had been served first, and an adequate time allowed to elapse between that service and the delivery of the plea, the plaintiff might, if he had thought proper, have safely given the undertaking, as then nothing would have appeared to prevent his fulfilling that undertaking. But, by not allowing an adequate time so to elapse, the plaintiff had been deprived of an advantage to which he was fairly entitled, as it could never have been the intention of the new rules of pleading to deprive plaintiffs of rights which they previously possessed, with respect to bringing back the venue.

LITTLEDALE, J.—Suppose the rule for changing the venue had been served in the morning, and the plea delivered in the afternoon, or even a longer space of time to have been allowed to elapse, the plaintiff would have been in no better situation. He could not have prevented the defendant from pleading the plea which he has pleaded, and then the plaintiff would be in the same situation with respect to it as he is now. If, in the interval between the service of the rule and the delivery of the plea, he had given an undertaking to produce material evidence in the county in which the venue was originally laid, he would not be able to fulfil his undertaking, since, from the nature of the issue joined between the parties, it would be impossible for him to produce such evidence. The present rule must therefore be discharged, without costs.

Rule discharged, without costs.

1836.
PHILLIPS
v.
CHAPMAN.

1836.

ATKINSON and Others *v.* CLEAN.

It is indispensably necessary, in order to obtain a distringas, that the hour should be mentioned at the time of making the appointments.

WILSON moved for a distringas. The affidavit on which he applied contained the usual requisites of affidavits for the purpose of obtaining the writ; but although the two appointments had been made according to the practice, the hour had not been mentioned at which the person endeavouring to effect the service would call again.

LITTLEDALE, J.—It is now the clearly settled practice that the hour must be mentioned when each of the appointments are made. You are therefore not entitled to your writ.

Rule refused.

PIERCE's Bail.

In a notice of bail for a prisoner, two days is sufficient, notwithstanding 1 Reg. Gen. T. T. 1 Will. 4; and the fact of his being a prisoner need not appear on the proceedings, or otherwise.

BUSBY opposed bail, on the ground that a sufficient notice of bail had not been given, as it was only a two days' notice.

J. Jervis contended that that was sufficient notice, the defendant being a prisoner, and therefore not coming within the meaning of 1 Reg. Gen. T. T. 1 Will. 4 (a). This had been the holding of the Courts in a variety of instances.

Busby admitted that a prisoner was not within the rule; but then it must appear on the proceedings, or by some other means, that the defendant was a prisoner. Here, no such fact was shewn. The Court could not take judicial notice of the defendant being a prisoner. He cited *Creighton's bail* (b), where it was held by Mr. Baron Gurney, that, in the notice of bail for a prisoner to justify at the time of putting in, it must appear that the defen-

(a) Ante, Vol. 1, p. 102.

(b) Ante, Vol. 1, p. 609.

dant is a prisoner. This not appearing, the notice was *primâ facie* a bad notice.

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PIERCE'S
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J. Jervis, in support of the bail, contended that it was unnecessary to introduce any such statement, as the plaintiffs must be perfectly aware that the defendant was a prisoner. The case cited was in the Exchequer, and this Court would, of course, not be bound by the practice of that.

LITTLEDALE, J.—It appears to me, that this is a sufficient notice. By the old practice it would clearly have been sufficient. Then the new rule, which has required four days' notice to be given, has been held by all the Courts not to apply to the case of prisoners. They therefore stand in the same situation as they did before the promulgation of that rule. As, then, the notice would have been sufficient before its promulgation, I think it is sufficient now. No inconvenience can result from such a notice, because the plaintiffs know that the defendant is a prisoner; and when the rule for the allowance of the bail and the supersedeas is drawn up, the officer of the Court will be informed in whose custody the defendant is. The decision cited is not by the full Court of Exchequer, or I should consider myself bound by it.

Bail passed.

Ex parte MINCHIN.

DOWLING moved to re-admit an attorney without a term's notice of his application to be re-admitted. The affidavit on which he moved stated that the attorney had regularly served his articles, been admitted, and taken out his annual certificate regularly down to the 15th November, 1835. At that time his last certificate expired. He was unable, from distressed circumstances, to take out his

An attorney may, under peculiar circumstances, be re-admitted without the usual term's notice, where he has been off the roll from the 15th to the 17th November.

1836.

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annual certificate after that time. An improvement having taken place in his circumstances, he had been desirous of renewing his certificate; and, knowing that he would not be off the roll for a year from the expiration of his last certificate, and supposing that the same time was allowed him in that case after the 15th November which attorneys are allowed in ordinary cases, that is to say, till the 16th December, he had not applied to the Stamp Office until the 17th November. He then ascertained that he ought to have applied before the 15th of that month. He had therefore come promptly to the Court (on the 18th) to apply for re-admission. His affidavit admitted, that he had practised during the uncertificated period, but stated that he had omitted to take out the certificate, from no fear of proceedings being taken against him. Notice had been given of this application at the Stamp Office, and no intimation had been given that it was intended to oppose it. Under these circumstances, it was hoped, that he might be re-admitted without the term's notice usually required.

LITLEDALE, J. (after consulting with Master Bunce.)— I think he may be re-admitted, on payment of twenty shillings fine and the arrears of duty, as it appears to have been so very short a time, and under such peculiar circumstances, that he was off the roll.

Admitted accordingly.

DOE *d.* SMITH and Others *v.* ROE.

The service of
a declaration
in ejectment,
the notice of
which is di-
rected to D. S., is not good on E. B., although E. B. is tenant of part of the premises.

HUMPHREY moved for judgment against the casual ejector. There were two tenants in possession. The ser-

The service of a declaration in ejectment, the notice of which is directed to D. S., is not good on E. B., although E. B. is tenant of part of the premises.

vice on one was regular. The peculiarity in the case as to the other was, that the declaration was directed to Mr. Daniel Scriven, who was tenant of the one part, and the service was sworn to have been on Elizabeth Beddoes, the wife of the tenant of the other part.

1836.

Don
d.
SMITH
v.
ROE.

LITTLEDALE, J.—That will not do. The declaration is directed to one person, and the service is on another. You are therefore not entitled to your rule.

Rule refused.

ELLIS v. GILES.

WIGHTMAN applied for a rule nisi for an attachment for non-payment of money pursuant to an award. The affidavit of service was somewhat peculiar. The deponent swore that he had endeavoured to serve the defendant with a copy of the award and rule, at the same time shewing him the original of each. The defendant, however, put his hands behind his back, and swore he would not take either. The deponent then demanded the sum due pursuant to the award, and left the copies of the award and rule on the ground, in the defendant's presence.

If a defendant will not take the copy of an award and rule, the other requisites of a service being complied with, it is sufficient for a rule nisi for an attachment.

LITTLEDALE, J.—I think that is sufficient to entitle you to your rule.

Rule nisi granted.

GREENWOOD v. DYER.

WHATELY shewed cause against a rule nisi for an attachment for not producing a certain indenture of apprenticeship, pursuant to a Judge's order. An order had

It is no answer to a rule for an attachment, that the Judge's order, which has been made

a rule of Court, has not been personally served, if the rule itself has been regularly served.

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 ———
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been made by Mr. Baron *Gurney* on the 29th July last, for the delivery of the indenture in question. That order was never personally served, but was afterwards made a rule of Court. The rule was personally served, but it was objected that, as the order had not been served, which was the foundation of the proceeding, the attachment ought not to go.

LITTLEDALE, J.—The fact of the order not having been served is immaterial, as the foundation of the contempt is the disobedience to the rule of Court.

Rule absolute.

—◆—
 The KING v. The Sheriff of SHROPSHIRE, in a cause of
 CHAPPELL v. BOWDLER.

A plaintiff has not lost a trial in a town cause, if he could have proceeded to trial at any time in the term next after the return of the writ; and, therefore, where a plaintiff might have proceeded to trial at the third sitting, though he could not at the first, he is not entitled to have the attachment stand as a security.

ERLE shewed cause against a rule obtained at the instance of the bail for setting aside an attachment against the sheriff, on payment of costs. The attachment was regular, and therefore the only question was, whether it ought to stand as a security or not. This would depend on whether the plaintiff had lost a trial. The writ was sued out on the 15th of July, and on it the defendant was arrested. On the 23rd a Judge's order was obtained to return the writ. On the 30th the sheriff returned that he had taken the defendant, and that he was out on bail. On the 29th the plaintiff declared *de bene esse*. At that time no notice of bail above had been given. On the 30th of July an order was served to bring in the body. On the 1st of August an assignment of the bail-bond was taken, and which was then discovered to be void on account of its having been taken in a larger sum than that for which the writ had issued, the writ being for 50*l.*, and the bail-bond being for 56*l.* 10*s.* On the 7th of August the defendant was rendered. The question then was, on this state of facts, whether a trial had been lost. The plaintiff

had declared on the 29th of July. If bail had been perfected in proper time, the plaintiff might have proceeded to trial at the first Sittings in Michaelmas Term. This, however, he had been prevented from doing, in consequence of bail not having been perfected in due time. He had consequently lost a trial, and therefore the attachment ought to stand as a security. By 5 Reg. Gen. H. T. 2 Will. 4 (a), it was ordered, "that, upon staying proceedings, either upon an attachment for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment on bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes." By the terms of this rule, therefore, the plaintiff was entitled to have the attachment stand as a security.

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 SHROPSHIRE.

LITLEDALE, J.—The plaintiff might have gone to trial at the third sittings in the term, though not at the first. The only case in which the plaintiff can be allowed to have the attachment stand as a security is, where he cannot proceed to trial in the term next after the return of the writ.

Busby, in support of the rule, contended that, according to the language of 5 Reg. Gen. H. T. 2 Will. 4, the plaintiff had not lost a trial. The words of the rule were, "from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable." The clear meaning of that rule was, that the attachment would stand as a security, if the plaintiff were prevented from going to trial at all in the term. It was true, in the pre-

(a) Ante, Vol. 1, p. 199.

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The KING
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SHROPSHIRE.

sent case, that the plaintiff could not have proceeded to trial at the first sittings in the term, but he might at the third.

LITTLEDALE, J.—By the old practice the plaintiff could not have had the attachment as a security. Now, the question is, whether, under the new rule of H. T. 2 Will. 4, he is entitled to it. That rule says, that the attachment shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, “in the term next after that in which the writ is returnable.” That, of course, means in any part of the term. The plaintiff could not have proceeded to trial in this case at the first sittings in the term. The rule, however, makes no distinction between the first, second, and third sittings, and according to the old practice there was no such distinction. As, therefore, the plaintiff might have proceeded to trial at the third sittings, I think the rule ought to be made absolute for staying proceedings on payment of costs, without the attachment standing as a security.

Rule absolute accordingly.

THOMAS v. Lord RANELAGH.

Service of a rule to compute at the residence of the defendant, where the process was served on a female servant of the defendant, is sufficient.

V. WILLIAMS moved to make a rule to compute absolute on affidavit of service. The deponent making the affidavit swore to a service of the rule nisi at the residence of the defendant, where the process had been served on a female servant. The affidavit then went on to state that the female servant had informed the deponent that her master was out of town, and had been so

for a month previous, and that she did not know when he would return.

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COLERIDGE, J.—I think that is a sufficient service; you may therefore take your rule.

Rule granted.

NEWNHAM v. HANNY and Others.

J. J. WILLIAMS shewed cause against a rule nisi obtained by *Cleasby* for setting aside the interlocutory judgment signed by the plaintiff in this case, on the ground of irregularity. The irregularity complained of was, that the declaration had been delivered on a day subsequent to that of which it bore date. It was delivered on the 26th of October, and was dated the 25th. The judgment, however, was not signed until the 4th of November. It being a country cause, the defendant was entitled to eight clear days' time to plead. That number of clear days had been given between the delivery of the declaration and the signing of the judgment. The defendant had five clear days in the month of October, and three clear days in the month of November. So far, therefore, as the defendant was substantially interested, he had obtained all the time for pleading to which, by the practice of the Court, he was entitled. But it was said that the day of the delivery not being the same as the date of the declaration, it was irregular, as being in contravention of 1 Reg. Gen. H. T. 4 Will. 4 (a). The words of that rule were, that "every pleading, as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration and other pleading

Where the plaintiff's declaration is delivered on the day after that on which it bears date, contrary to 1 Reg. Gen. H. T. 4 Will. 4, (pleading rules), it is an irregularity, which is waived by delaying to come to the Court from the 26th of October to the 9th of November.

(a) Ante, Vol. 2, p. 313.

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 {
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shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge." The object of this rule evidently was to prevent parties from being deprived of the full number of days to which, by the practice of the Court, they were entitled, in consequence of the opposite party not delivering or filing the different pleadings in the cause on the day of which they bore date. But in the present instance the defendant has been allowed the full time to which he was entitled according to the practice of the Court. At most, therefore, the objection amounted to a mere irregularity; and the defendant should have come to the Court within a reasonable time after he became acquainted with the irregularity. Now, he must have become acquainted with it on the 26th of October, on the delivery of the declaration; but no application was made to the Court until the 9th of November. By his laches then he had waived the irregularity. In *Fynn v. Kemp* (a) it was held that a motion to set aside proceedings for irregularity was too late after a lapse of seven days; and in *Scott v. Cogger* (b) the Court held an application to set aside an interlocutory judgment for irregularity, after notice of inquiry on the 4th November, to be too late on the 12th. This case was different from one in which the declaration was *filed*; for there the defendant might not immediately become acquainted with the irregularity. There might, consequently, in such a case, be some excuse for delay in coming to the Court. But here the declaration was *delivered*, and therefore the knowledge of the irregularity must have reached him immediately on its delivery. The Court would not allow him to lie by for such a length of

(a) Ante, Vol. 2, p. 620.

(b) Ante, Vol. 3, p. 212.

time without coming to the Court, in order to avail himself of the objection.

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Cleasby, in support of the rule, contended that the cases cited were totally inapplicable. The objection to the plaintiff's proceedings was, that the declaration had been delivered on the 26th, it being dated on the 25th. The question then arose as to the time within which advantage ought to be taken of that objection. Mr. *Tidd* (a) laid down the rule in these terms—"The application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance; and when there has been any irregularity, if the party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it." No doubt, if the party who seeks to complain of the irregularity, takes a step after the alleged irregularity has arisen, he waives it. But the circumstance of the opposite party taking a step does not deprive the former party of his right to object. He has a right to wait until he sees that his opponent intends to act on the irregular step. In *Moffat v. Carter* (b) it was held that, where a notice of declaration was a nullity, the defendant was not obliged to apply to set aside the judgment signed, for want of a plea, until notice of a writ of inquiry. The defendant, therefore, was not bound to come to the Court until judgment had been signed. But, at any rate, notice was given in the present case to the plaintiff, that, unless the declaration was waived, an application would be made to the Court to set it aside. In *Topping v. Fuge & Ingram* (c) the plaintiff served irregular process on the defendant. The latter gave notice of the irregularity, and that, if the plaintiff proceeded on it,

(a) Practice, Vol. 1, p. 513, 9th edit.

(b) 2 N. R. 75.

(c) 5 Taunt. 330.

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the defendant would move to set aside the proceedings. The Court there held that this was an exception to the ordinary rule, that the party applying to set aside irregular proceedings must come before the other party has taken any other step in the cause.

LITTLEDALE, J.—I think the fact of the declaration having been delivered makes a difference. If it had been filed and notice given, the defendant might never have taken it out of the office.

Cleasby cited *Hill v. Parker* (a), where the Court held that a notice of declaration, served with a copy of a writ, is bad; and the defendant is in time to take advantage of it, if he comes to the Court immediately after the next step the plaintiff takes.

LITTLEDALE, J., referred to the cases of *Smith v. Clarke* (b), where it was held that interlocutory judgment cannot be set aside, because the notice of declaration is irregular; and *Hinton v. Stevens* (c), where it was held that an objection to a notice of declaration, on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation.

Cleasby contended that the objection founded on the difference of the date of the declaration and of the delivery, was not a mere irregularity in a point of form, but was substantial. The direct tendency of such a variance was to curtail the defendant of his proper time to plead.

LITTLEDALE, J.—It is impossible to reconcile all the cases on this point; but it seems to me, upon the whole,

(a) 2 Chit. Rep. 165.

(b) Ante, Vol. 2, p. 218.

(c) Ante, Vol. 4, p. 283.

that the application to set aside the judgment was too late. The objection taken to the declaration only amounts to an irregularity in not complying with the rule, without having the effect of misleading the defendant as to the time of pleading, as the plaintiff did not actually sign judgment until eight days from the time of delivery, when he was fully entitled to sign it. There are cases in which the Court has decided that the complaining party may wait until the offending party has taken a fresh step before he applies to the Court; but there are several other cases in which it has been held that he cannot do so. If this had been the case of a *notice* of declaration, instead of a *delivery* of a declaration, I think the defendant would not have been bound to come to the Court till after the judgment had been signed, and then this application would not have been too late. But here the defendant's attention was called to the irregularity by the delivery. One would, of course, suppose that this objection would have formed the subject of discussion at the time when the defendant considered the period left him for pleading. In applications on the ground of irregularities in the writ, it is now the recognised rule that the defendant must come to the Court before the time for appearance is out; because the objection, whatever it may be, must have come to the knowledge of the defendant before the expiration of that period. So, in the present case, you ought to have applied to the Court within the time allowed for pleading, because at that time you must have been aware of the objection. The present rule must therefore be discharged, but without costs.

Rule discharged, without costs.

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KELLY v. BROWN.

The Court will not superadd to a rule for security for costs, the term of the defendant being at liberty to sign judgment as in case of a nonsuit, if the security should not be given within a limited time.

THE Attorney-General moved for a rule to shew cause why the plaintiff in this case should not give security for costs within fourteen days, or why, in the alternative, the defendant should not be allowed to sign judgment as in case of a nonsuit absolute. It was an action on a life policy of insurance, and the action had been commenced in the month of February, in the year 1835. The plaintiff was resident in Ireland, and was an Irishman. The action was brought under very vexatious circumstances, which were disclosed in his affidavit, among others that the plaintiff was quite insolvent. There was consequently no kind of probability, or even possibility, that he would be able to give security for costs. The only mode, therefore, in which the defendant could free himself from such vexatious proceedings, was to obtain a rule, with the alternative proposed, of enabling the defendant to sign judgment as in case of a nonsuit, if security for costs should not be given by the plaintiff within fourteen days.

LITLEDALE, J.—You cannot have the rule in the form you pray, with the alternative of signing judgment as in case of a nonsuit; you can only have it with the ordinary consequence of a stay of proceedings, in case the plaintiff does not give the security required.

The Attorney-General.—Either we go on, or we do not go on. If we go on, we go on at the peril of incurring costs, which we shall never be reimbursed, whatever may be the result of the cause; if we do not go on, then this cause remains hanging over us, and we can have no chance of being reimbursed those which we have already incurred.

LITLEDALE, J.—It is true that you are in a dilemma,

but I do not think that I can assist you. You can only have the rule in the usual form, which will operate as a stay of the plaintiff's proceedings.

Rule accordingly.

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KELLY
v.
BROWN.

FRY v. CHAPMAN.

V. LEE shewed cause against a rule nisi obtained by *R. V. Richards* for entering a nonsuit in this cause, or for a new trial, on the ground of a defect in the evidence produced in support of the plaintiff's case. It was an action for use and occupation, and was tried before the sheriff. The plaintiff proved his case, without producing a written agreement under which the premises were held, and obtained a verdict for 5%. The present application was to set aside that verdict and enter a nonsuit, on the ground that the plaintiff was bound to produce the written agreement under which the premises were held. *V. Lee* now submitted that this was no objection to the verdict. If, in the course of proving his case, the plaintiff's evidence had disclosed the existence of a written agreement under which the defendant held, of course he must have produced it; but, as he had been able to conclude his case without such a disclosure, no objection existed to the verdict. It was true that the defendant had afterwards produced the agreement, but that was for his discretion in the management of his own case. The present rule ought, therefore, to be discharged.

In an action for use and occupation, it is not a ground for nonsuit that the plaintiff does not produce a written agreement under which the premises are held, if the evidence given by the plaintiff in support of his case does not disclose the existence of such an agreement.

LITLEDAL, J.—It appears to me that the non-production of the written agreement is no ground for setting aside the verdict. If the plaintiff was able to conclude his case without disclosing the existence of a written agreement, he was not obliged to produce it.

R. V. Richards admitted that he could not sustain his rule on that ground.

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v.

CHAPMAN.

LITTLEDALE, J., after entering into the other facts of the case, granted a new trial on payment of costs.

Rule accordingly.

ROBINSON v. STODDART.

Where a plaintiff has signed an interlocutory judgment, for want of a plea, too soon, and the plaintiff gives notice of his intention to abandon it, but does not actually strike it out, the defendant need not come to the Court to set it aside; but the Court discharged a rule for that purpose without costs.

PETERSDORFF shewed cause against a rule nisi which had been obtained by *Dowling* for setting aside an interlocutory judgment for irregularity. The declaration had been delivered on the 27th of October, indorsed to plead in four days. This time would expire on the 31st. On that day the defendant obtained four days' further time to plead. On the 3rd of November the defendant delivered pleas, which, not being signed by counsel, were irregular. On the 4th, the pleas were again delivered, with counsel's signature. On the morning of the 5th, at the opening of the office, the plaintiff signed judgment as for want of a plea. An application was then made to the plaintiff to abandon his judgment. This he agreed to do, but refused to pay any costs to the defendant for searching; and although he had agreed to abandon the judgment, he did not strike it out of the book. *Petersdorff* admitted that the judgment must be considered as irregular, inasmuch as regular pleas had been delivered before the time for pleading had expired; but, after the plaintiff had expressed his willingness to abandon the judgment, there was no occasion for the defendant to come to the Court for the purpose of setting aside the judgment. The present rule ought, therefore, to be discharged, and with costs.

Dowling, in support of the rule, contended, that, so long as the judgment remained in the book, it was in force. The defendant, therefore, was compelled to come to the Court to set it aside.

LITTLEDALE, J.—It does not appear that the defendant asked the plaintiff to strike out the judgment. Having given notice that they abandoned it, I do not think there was any occasion for the defendant to come to the Court. But as, strictly speaking, the defendant had a right to have the judgment struck out, the rule may be discharged, without costs.

Rule discharged, without costs.

LEWIS v. HILTON.

CHILTON shewed cause against a rule nisi obtained by *R. V. Richards* for a new trial, on the ground of improper admission of evidence on the part of the defendant. It was an action for the recovery of a surgeon's bill, and was tried before the under-sheriff of Cardigan. The defendant obtained a verdict. A set-off having been pleaded at the time of the delivery of the plea, the particulars of it were attached. The action was brought in the Court of King's Bench, but the particulars were headed in the Exchequer. At the trial, after the plaintiff had proved his case, the defendant proposed to give evidence of his set-off. It was then objected on the part of the plaintiff, that, as the particulars were headed in the Exchequer, they could not be used in a cause tried on a King's Bench record. No evidence, therefore, could be received in support of the plea. The under-sheriff overruled the objection, admitted the evidence, and the defendant had a verdict. It was now sought to set aside that verdict, and obtain a new trial, on the ground that the ruling of the sheriff with respect to the particulars was wrong.

LITTLEDALE, J.—I think that, as there was no order of the Court of Exchequer, or of a Judge of it, for the delivery of the particulars, there was no objection to using

1836.

ROBINSON
v.
STODDART.

It is no objection to the use of particulars of set-off that they are headed in a different Court from that in which the action is brought, if they have not been delivered pursuant to a Judge's order.

1836.

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v.

HILTON.

them, although they were headed in a different Court from that in which the action was brought.

The rule for a new trial was afterwards made absolute, on terms.

Rule absolute accordingly.

Badham v. Badham 1. *Exch.* 824.

WYATT v. PREBBLE.

The enlargement of one rule is a violation of a subsequent one in the same matter, which is drawn up with a stay of proceedings.

HUMFREY moved for leave to enlarge a rule, under these circumstances:—A rule nisi for an attachment had been obtained by *Humfrey* on a former day against an attorney, for not delivering his bill, pursuant to a Judge's order, subsequently made a rule of Court. *Archbold* afterwards obtained a rule nisi to rescind the Judge's order, and a part of the rule was, "a stay of proceedings." The attorney on whose part *Humfrey* had applied, was not aware that personal service of the rule nisi for the attachment was necessary, and therefore only served it at the defendant's dwelling-house. The present application was consequently made to enlarge the rule nisi for the attachment until the last day of the term, in order to give the applicant an opportunity of effecting personal service. The only difficulty was, whether such an enlargement could take place, while the rule was pending for setting aside the Judge's order, with "a stay of proceedings." This could hardly be considered as a "proceeding," inasmuch as it was only keeping alive a rule which had already been obtained.

LITLEDALE, J.—I think you cannot be allowed to enlarge your rule, as that enlargement would be a "proceeding," and therefore in violation of the rule which has been drawn up, with a stay of proceedings.

Rule refused.

1836.

CASSELL v. Lord GLENGALL and Another.

STEER moved to set aside a warrant of attorney, and the judgment signed thereon, on the ground of a defect in the memorial of the annuity, the payment of which the warrant of attorney had been given to secure. The defect was, that the name of only one of the grantors and one of the grantees had been introduced, there being two grantors and two grantees. On the warrant of attorney, judgment had been signed, and a writ of fi. fa. issued and executed. The sheriff had made his return to the writ, of nulla bona. The plaintiff in the action then commenced proceedings against the sheriff for a false return. It was wished to engraft on the rule for setting aside the warrant of attorney, and all proceeding under it, the term, that the proceedings in the action against the sheriff should be stayed.

The Court will not, on an application to set aside a warrant of attorney, and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside.

LITLEDALE, J.—That must be made the subject of a separate application. You cannot make it part of your rule to stay proceedings against the sheriff, on this application to set aside the warrant of attorney. You may take your rule for the latter purpose only.

Rule accordingly.

HAYWOOD'S BAIL.

LUMLEY opposed bail, on the ground that an alteration had been made in the bail-piece, in the name of one of the bail. The name had originally been written "Hayward," but it had been altered to "Haywood." No ex-

It is no objection to the justification of bail that an alteration has been made in the bail-piece, in the name of one

of the bail, if the officer taking the bail has placed his initials against the alteration.

The fact of an attachment having been obtained against the sheriff for not bringing in the body, is no objection to the justification of bail.

1886.

HAYWOOD'S
Bail.

planation was given as to the cause of this alteration, but merely the initials of the commissioner before whom the affidavit was sworn were put in the margin opposite the alteration. In the affidavit of due caption the name was Haywood.

LITTLEDALE, J.—It is not necessary that any explanation should be given of the cause of the alteration, if the person taking the bail has put his initials opposite the alteration.

Lumley then objected that it was too late to put in bail, because an attachment had already been obtained on the 7th of November, returnable on the 14th, for not bringing in the body.

LITTLEDALE, J.—That is no objection to the bail justifying. I do not say what may be the effect of the justification; but valeat quantum.

Bail passed.

BLACK v. CLOUP.

A rule to compute cannot be made absolute on an affidavit that the rule nisi has been left at the lodgings of the defendant, where he was served with the writ, if it appears that the defendant had left before the rule nisi was obtained: it must be shewn that endeavours have been made to find the defendant without success; then the

S. HUGHES moved to make absolute a rule to compute. The affidavit of service stated, that the clerk who went to serve the rule nisi was informed at the house where the defendant had lodged when he was served with the writ and notice of declaration, that the defendant had gone away, and it was not known where; that no one was authorized to take in papers for the defendant; and that a copy was then left at the lodgings.

LITTLEDALE, J.—I think that affidavit is not sufficient. It should at least be shewn that efforts have been made to find the defendant.

Court will grant a rule nisi that service of the rule, by leaving it at the defendant's last place of abode, and sticking up a copy in the office, may be deemed good service.

On a subsequent day, *S. Hughes* applied on an amended affidavit, shewing the inquiries and efforts made to find the defendant; that his residence could not be found; and that a copy of the rule had been stuck up in the office. He cited *Payett v. Hill* (a), as in point, and urged, that, if this rule were not granted, the plaintiff's proceedings would be rendered useless.

1836.

BLACK
v.
CLOUP.

COLBRIDGE, J.—You may have a rule calling on the defendant to shew cause why this service should not be deemed good service, and the rule nisi may be served in the same way as the former rule.

This rule was afterwards made absolute, no cause being shewn.

(a) Ante, Vol. 2, p. 568.

DOE d. WELCHON v. ROE.

THOMAS moved for judgment against the casual ejector. All the proceedings were regular, and personal service had been effected on the tenant in possession.

If the service in ejectment is quite regular, the papers should be at once taken to the rule office, without applying to the Court.

LITTLEDALE, J.—If all the proceedings are regular, the papers ought to have been taken at once to the rule office, without application to the Court. It is only where there is something peculiar in the service, that it is necessary to make an application to the Court.

Rule granted.

MERCERON v. MERCERON.

PRICE moved to discharge the defendant out of the custody of the sheriff of Middlesex, on entering a common appearance, on the ground that it appeared from

The fact of its appearing by the plaintiff's particulars that the debt is barred by the Statute of Li-

mitations, is not a ground for discharging a defendant out of custody on mesne process.

1836.
 ┌
 MERCERON
 v.
 MERCERON.

the proceedings that the plaintiff had no cause of action. The defendant had been arrested in the month of January last for the sum of 150*l.*, and the cause was now at issue. The particulars of the plaintiff's demand shewed that the debt had been barred by the Statute of Limitations. The defendant had pleaded the statute, but the affidavit on which the application was founded did not state what the plaintiff had replied. It was clear, however, on the plaintiff's own shewing, in his particulars of demand, that he had now no cause of action. Under such circumstances, the Courts had on different occasions interfered, where there was probable reason for thinking that the defendant would ultimately succeed. He cited *Sumner v. Green* (a), the marginal note of which was, "Where a defendant is arrested on a contract, the legality of which is doubtful, and which may eventually subject the plaintiff to a penalty, the Court will discharge him on entering a common appearance:" and *Wightwick v. Bankes* (b), the marginal note to which was, "If there is a probable ground to suspect that the securities upon which the defendant is held to bail are illegal, the Court will discharge him upon finding common bail."

LITLEDALE, J.—I do not feel prepared to grant the rule. You may, however, apply to the other Court.

Price afterwards applied to the full Court, and stated the same facts, and cited the same authorities.

LORD DENMAN, C. J.—We will look into the authorities, and see whether the application can be granted.

Cur. adv. vult.

LORD DENMAN, C. J.—We have examined the authorities, and we think the application cannot be granted. If

(a) 1 H. Black. 301.

(b) Forrest, 153.

the cases referred to were to be re-considered, it is probable that a different decision would be pronounced.

Rule refused.

1836.
MERCERON
v.
MERCERON.

DOR d. GOWLAND v. ROE.

HUMFREY moved for judgment against the casual ejector. The peculiarity of the case was, that the declaration was dated Trinity Term, 6 Will. 4, instead of "7 Will. 4."

A declaration in ejectment entitled "6 Will. 4," instead of "7 Will. 4," is irregular.

LITTLEDALE, J.—That is irregular.

Rule refused.

CROSBY v. FORTESCUE.

BAINES moved for a rule nisi for a mandamus to be directed to the steward of a lord of the manor, commanding him, pursuant to 3 & 4 Will. 4, c. 74, s. 53, to enter on the court rolls of the manor a certain deed of disposition, made pursuant to the provisions of that section. The words of the section were—"That a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall

In applying for a mandamus to the steward of a manor to enrol a deed of disposition, pursuant to 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit.

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v.
FORTESCUE.

be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls; and he shall endorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration. under any subsequent assurance duly entered on the court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered." The steward had been applied to, and had refused to make the entry. The only question was, whether, on making this application, it was necessary to have a copy of the deed attached to the affidavit on which the application was made. The affidavit in support of the application contained a tolerably full statement of the contents of the deed. Were it necessary to annex a copy of the deed itself, which was exceedingly long, great expense must be incurred by the parties.

LITLEDALE, J.—I do not think that it is necessary to annex a copy of the deed itself, as you have a statement of its contents in your affidavit.

Rule granted accordingly.

1836.

JAMES v. TREVANION.

STEER moved to discharge the defendant out of custody, on the ground of an alleged defect in the affidavit of debt. It was an action by the indorsee against the maker of a promissory note. The affidavit stated the fact of the various indorsements by which the note came to himself, but it did not state or describe him to be the indorsee of the promissory note, or allege the default of the maker.

In an affidavit of debt by the indorsee of a promissory note against the maker, it is not necessary that the deponent should describe himself as the indorsee, if he traces title to himself; nor is it necessary to allege the default of the maker.

LITTLEDALE, J.—It is not necessary that he should call himself the indorsee, if he traces the title to the note from the maker to himself; nor is it necessary that he should allege the default of the maker. It is only where the action is brought against persons collaterally liable, that you state the default of those who are directly liable. I see no objection to the affidavit of debt.

Rule refused.

Ex parte THOMSON.

DOWLING moved for the re-admission of an attorney. The affidavit on which he applied stated the fact of the attorney having been duly admitted; his having taken out his certificate for a number of years; his having discontinued to take out his certificate in consequence of distressed circumstances; his having given notice to the Stamp Office. The only peculiarity was, that the applicant, while off the roll, had practised in some cases in the borough court of Wells, where, it appeared, persons need not be attorneys in order to practise. This, it was submitted, could not amount to "practising," within the meaning of the statutes. It was also sworn that the applicant had served process for several London attorneys. This was also submitted to amount to no objection, as any

It is no objection to an attorney being re-admitted, without payment of fine or arrears of duty, that he has acted as an attorney in a borough court, where persons, not attorneys, may practise, and has served process for other attorneys.

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THOMSON.

person, although not an attorney, might serve process for an attorney, as that was merely the business of a clerk. Under these circumstances, the applicant would be entitled to his re-admission, without payment of fine or arrears of duty.

LITLEDALE, J.—I think he may be re-admitted without payment of fine or arrears of duty.

Re-admitted.

FOWELL and Another v. PETRE.

(Before the Four Judges.)

A prisoner comes too late, after 19 days, to object to a defect in the affidavit to hold to bail.

Semble, that an affidavit to hold to bail is not sufficient which states that the defendant is indebted in "principal monies" due on a bill of exchange, unless it also states the amount for which the bill is drawn.

BAGLEY obtained a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, for a defect in the affidavit to hold to bail. The affidavit was in these words—"That P. W. P. (the defendant) is justly and truly indebted to the said F. K. F. and S. H. B. (the plaintiffs) in the sum of 500*l.* of lawful money of Great Britain, for principal monies due upon a certain bill of exchange drawn by the said P. W. P. upon one R. E., and payable to the order of the said F. K. F., and which said bill of exchange was indorsed by the said F. K. F. to the said F. K. F. and S. H. B., and became due and payable at a day now past, and which said bill has been refused acceptance by the said R. E., although presented to him on the day when it became due, and the amount of the said bill of exchange still remains due and unpaid." The objection taken to the affidavit was, that it omitted to state the amount for which the bill was drawn.

W. H. Watson shewed cause in the full Court on a subsequent day.—There were two answers to the rule—1st, The defendant had not taken his objection in time.

The rule of Court (a) expressly declares that "no application to set aside proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." In this case it appeared that the writ was sued out and delivered to the sheriff, and the defendant detained in custody under it, on the 26th of October, and the rule was not moved for until the 14th of November. No less than nineteen days, therefore, had elapsed before the defendant had applied; and it had been holden in *Tucker v. Colegate* (b), that an irregularity in the affidavit to hold to bail must be taken advantage of before the eight days limited for putting in bail had elapsed. *Fynn v. Kemp* (c), and *Firley v. Rallett* (d), were to the same effect. 2ndly, The affidavit to hold to bail was sufficient. No doubt, it was settled in *Brook v. Coleman* (e), in the Court of Exchequer, followed afterwards by *Molineux v. Dorman* (f) in the same Court, and by *Westmacott v. Cook* (g) in the Bail Court, that an affidavit of debt on a bill of exchange should state the amount of the bill; but those cases proceeded on the principle that without such an allegation the defendant might be arrested for interest merely. In the present affidavit no such objection could prevail, for it was distinctly stated that the defendant was indebted for "principal monies."

Bagley, in support of the rule.—The case was before a Judge at chambers before the rule to shew cause was moved for, which accounts for the delay. The defendant was detained under the writ on the 26th of October, and a summons, returnable before a learned Judge at cham-

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FOWELL

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PETRE.

(a) 1 Reg. Gen. Hilary Term,
2 Will. 4, s. 33, ante, Vol. 1, p. 187.

(b) Ante, Vol. 1, p. 574.

(c) Ante, Vol. 2, p. 620.

(d) Ante, Vol. 2, p. 708.

(e) Ante, Vol. 2, p. 7.

(f) Ante, Vol. 3, p. 662.

(g) Ante, Vol. 2, p. 519.

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PETRE.

bers, was taken out on the 6th of November (a). It could not be said, therefore, that there had been any unreasonable delay, especially when it was considered that the defendant was in custody; and the Court had held in various cases, that the rule requiring applications to be made promptly should not be applied so strictly to prisoners as to other persons (b), for a prisoner had not always the same facilities of procuring professional assistance. On the question as to the validity of the objection to the affidavit, it really resolved itself into this—was a party making an affidavit of debt at liberty to depart from the established form, sanctioned by repeated decisions of the Courts, and to substitute other words, which may or may not be equivalent? In *Brook v. Coleman*, the rule was stated by *Bayley*, B., without any qualification, after consultation with the other Judges, that, in an affidavit to hold to bail on a promissory note or bill of exchange, it is necessary to state the amount; and this decision is fully recognised in the subsequent cases. The importance of adhering to the established practice in such cases is strongly exemplified by what fell from the Court in *Witham v. Gompertz* (c), which was an objection to an affidavit of debt for omitting to allege notice of presentment or dishonour. *Abinger*, C. B., said in that case—“The Court thinks the affidavit sufficient, as it appears to be according to the form long used in practice; otherwise I certainly should have thought it insufficient.” In this case the affidavit is not according to the form used in practice (d). [Here he was stopped by the Court.]

DENMAN, C. J.—We think the objection to the affidavit is valid, if it is in time. I cannot tell what the person making

(a) These facts did not appear on the affidavit on which the rule was obtained.

(b) See, as to this point, *Rock*

v. Johnson, ante, Vol. 4, p. 405; *Sharpe v. Johnson*, Id. 324.

(c) Ante, Vol. 4, p. 382.

(d) *Tidd's Forms*, 9th ed., p. 79.

this affidavit means by "principal monies." But we have great doubt whether the application is not too late.

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v.
PETRE.

Subsequently it was stated that the Court were of opinion that the application was too late, and the rule was discharged.

PHILLIPS v. BERKELEY, Clerk.

BALL shewed cause against a rule nisi obtained by Tomlinson, calling on the Bishop of Hereford to shew cause why he should not return what had been levied under a writ of *levari facias*, which had been issued to his predecessor. As a preliminary objection, it was contended, that, as the attorney in the cause had been changed, and no order for the change had been served on the bishop, the rule must be discharged. He cited *The King v. The Sheriff of Middlesex*, in *Crawford v. Boyd (a)*. There, the Court set aside an attachment against the sheriff, on the ground that the rule for bringing in the body had been obtained in the name of an attorney who had not appeared in the previous proceedings, no order having been served for the change of attorney.

It is a good objection to a rule requiring a bishop to make his return to a *levari facias*, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served upon the bishop.

A bishop cannot be required to make a return of what has been levied, under a *levari facias*, previous to his coming into office.

LITTLEDALE, J.—That is a good objection.

Ball said he was not desirous of pressing this preliminary objection, or of resisting the rule, if the bishop were only required to do that which was reasonable. His lordship was perfectly willing to make a return of all that had been levied since he had been appointed Bishop of Hereford, but the rule required him to make a return of what had been done in previous years. This, it was submitted, he could not be required to do.

(a) Ante, Vol. 2, p. 147.

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 PHILLIPS
 v.
 BERKELEY,
 Clerk.

LITTLEDALE, J.—The Bishop cannot be called upon to make a return of what was levied before he came into his office. The rule may be enlarged until the next term, and then he can return what has been levied since he has come into office.

Rule accordingly.

STROTHER v. RANDERSON.

Trespass.
 Pleas—first, not guilty; second, a justification. Replication and new assignment. Demurrer to replication and new assignment; 15*l.* damages on first issue, and nominal damages on second. The plaintiff entered a nol. pros. to the new assignment, and gave defendant judgment on demurrer; the Court set aside the nol. pros.

HOGGINS shewed cause against a rule nisi obtained by *Blackburn* for setting aside a nolle prosequi entered by the plaintiff as to his new assignment. It was an action of trespass for an assault. The defendant pleaded—first, not guilty; and, secondly, a justification. The plaintiff replied, joining issue on the two pleas, and new assigning. The defendant demurred to the replication, and the new assignment. The plaintiff went down to trial, and obtained a verdict, with 15*l.* damages on the first issue. It being doubtful what might be the judgment of the Court on the demurrer, at the suggestion of the learned Judge who tried the cause, the jury found a verdict for the plaintiff with sixpence damages on the second issue, and sixpence damages on the new assignment. The plaintiff then entered a nolle prosequi as to the new assignment, and gave the defendant judgment on demurrer. This, it was submitted, the plaintiff might do, as it was a matter of discretion with him whether he would or would not enter a nolle prosequi.

COLERIDGE, J.—I think he cannot, under these circumstances, enter a nolle prosequi as to the new assignment. He may enter a nolle prosequi as to the whole cause of action. But, were he to proceed as he desires, he would be taking the chance of a verdict on the general issue, and, if he succeeded, he would abandon his new assignment, keeping all he could get by the verdict.

Rule absolute.

COURT OF EXCHEQUER.

Michaelmas Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

BROWN v. JARVIS, Esq.

1836.

CASE.—The declaration stated that one B. Bolton was indebted to the plaintiff in the sum of 86*l.* 8*s.* 4*d.* upon and in respect of certain causes of action before then accrued to the said plaintiff against the said B. B. And he the plaintiff, for the recovery of his said debt, theretofore, to wit, &c., sued and prosecuted out of the Court of our lord the now King, before his justices of the bench, against the said B. B., a certain writ of our said lord the King, called a *capias*, directed to the sheriff of the county of Hants (setting out the writ). And the said plaintiff further saith, that the said writ, afterwards and before the delivery thereof to the said defendant as such sheriff of the county of Hants, to be executed as was therein-after mentioned, was duly marked and indorsed for bail for a certain sum, to wit, 86*l.* 8*s.* 4*d.*, by affidavit, according to the form of the statute in such case made and provided. And that the said writ so indorsed was afterwards, and within four calendar months from the date thereof, including the day of such date, delivered to the said defendant, who then and from thence, until, and at and after the expiration of the said four calendar months, was sheriff of the said county of Hants, in due form of law to be executed. And the said plaintiff in

A sheriff is bound to arrest a party within a reasonable time after the delivery of the writ to him; and if he neglect so to do, he is liable for any damage which may result from his negligence; and, in order to maintain the action, it is not necessary to aver in the declaration that the writ has been returned.

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BROWN
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fact saith that the said B. B. at the time of the delivery of the said last-mentioned writ to the said defendant, so being sheriff of the said county of Hants, as aforesaid, and from thence for a long time, to wit, until a certain other day, to wit, on the 9th day of October, 1834, was within the said sheriff's bailiwick, and the said sheriff during that period, and more than eight days before the death of the said B. B. thereafter mentioned, might and could have taken and arrested the said B. B. by virtue of the said writ, at the suit of the said plaintiff, if he would so have done; whereof the said defendant, so being sheriff as aforesaid, during all that time had notice, and was during that time, and more than eight days before the death of the said B. B., to wit, on divers days between the time of the delivery of the said writ to the defendant as aforesaid, and the said 9th day of October, 1834, requested by the said plaintiff so to do. Yet the said defendant, so being sheriff of the said county of Hants as aforesaid, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly to injure the said plaintiff, and to delay and hinder him in and from the recovery of his debt last aforesaid, did not, nor would, at any time before the 9th day of October, 1834, or within a reasonable time for that purpose after the delivery of the said writ to him the defendant to be executed as aforesaid, (although a reasonable time for that purpose elapsed between the time of the delivery of the said writ and the commencement of the period of eight days next before the death of the said B. B. as thereafter mentioned), take or cause to be taken the said B. B. as by the said last-mentioned writ he was commanded, but therein wholly failed and made default; and the said B. B. afterwards, to wit, on the day and year last aforesaid, being at large in the bailiwick of the said sheriff, to wit, on the 4th day of October, 1834, met with an accident which he would not have met with if he had been in the custody of the

said sheriff, and by reason and in consequence of the said accident the said B. B. afterwards, to wit, on the 9th day of October, 1834, died; whereby and by means and in consequence of the premises, the said plaintiff had been and was greatly injured and delayed in the recovery of his aforesaid debt, and was likely to lose the same, and thereby also the said plaintiff had lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended in and about his said suit so commenced and prosecuted against the said B. B. The defendant pleaded—*first*, that B. B. was not indebted to the plaintiff; *secondly*, that the defendant used all diligence in his power to take the said B. B., which last plea was traversed by the replication. At the trial before *Littledale J.*, at the last Spring Assizes for the county of Hants, it was submitted by the defendant's counsel, that the action could not be maintained, inasmuch as there had not been any return of the writ, and it did not appear from the evidence that the plaintiff had sustained any legal damage from the sheriff's negligence. The learned Judge was of opinion, that it was not necessary to wait until the writ had been returned, and thought the plaintiff entitled to nominal damages. The jury found for the plaintiff, with 40*l.* damages.

Dampier having in last Easter Term obtained a rule for a new trial, or to arrest the judgment, or that the verdict should be reduced to nominal damages,

Erle and *Crowder* shewed cause.—First, it is objected that the action is not maintainable against the sheriff, because, under the new form of writ, he has the period of four months within which he is to execute it, and consequently is not responsible until the expiration of that time; but the sheriff is clearly bound to execute the writ within a reasonable time after he has received it.

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The principle is the same as in writs of fi. fa., and it has been held that the sheriff is bound to sell the goods taken within a reasonable time, and before the return of a venditioni exponas. *Jacobs v. Humphrey* (a). The 2 Will. 4, c. 39, s. 15, which authorizes a Judge to order the return of a writ when he thinks proper, has only given an additional power to the plaintiff to enforce the return; the period of four months mentioned in the writ defines the time during which the sheriff must execute the writ. *Secondly*, the plaintiff has sustained a damage by the defendant's negligence. The defendant, as a public officer, is liable for negligence or a breach of duty, though a private individual might not be. *Parker v. Green* (b); *Bales v. Winkfield* (c). The plaintiff has sustained a damage, inasmuch as Bolton was a man of apparently good circumstances; and, if he had been arrested, he would probably have paid the money, rather than go to prison.

Dampier and *White*, in support of the rule, contended that the judgment must be arrested, because the return day of the writ was not set forth in the declaration, and it did not appear that the defendant had made any return. Under the old forms of writs, the return day is always shewn upon the record. *Stovin v. Perring* (d); *Morland v. Lee* (e). The 2 Will. 4, c. 39, was never intended to alter the law of pleading; the only object of the act was to render the process uniform. The sheriff has four months to make the arrest, and if the plaintiff requires a speedy return, he must obtain a Judge's order. Here the arrest became impossible before the proper time of making the return. There is no pretence for the damages which the jury have given; it does not follow that if Bolton had been arrested, the plaintiff would have recovered his

(a) 2 C. & M. 413.

(d) 2 B. & P. 561.

(b) 2 Bing. 317.

(e) 1 Stark. N. P. 388.

(c) 2 N. & M. 831.

debt; he might have given bail, or gone to prison, and have died, even though the sheriff had arrested him.

Cur. adv. vult.

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Lord ABINGER, C. B., now delivered the judgment of the Court.—This case came on the other day, on a motion for a new trial, or in arrest of judgment, or that the verdict should be reduced to nominal damages; and the question was, whether, under the circumstances of the case, any damages could be recovered? The Court have entertained a long argument, but all the discussion has become nugatory, because there is no plea of the general issue. There were two issues upon the record, which were found against the defendant; so that the only question was, what damages the jury ought to give? They gave 40%, which was clearly unreasonable, and must be reduced. The point on which I felt great doubt does not therefore arise. If it had appeared on the face of the declaration that the plaintiff could not have sustained any damage by reason of the sheriff's negligence, the judgment must have been arrested, for the sheriff is not liable for neglect not followed by any injury; but the defendant, by not pleading the general issue, must be considered as having admitted the allegations in the declaration. Now, the declaration alleges that the defendant neglected to take the defendant in the cause when he might have done, and, in consequence of his not being taken, he afterwards died. However improbable that may be, as it is not denied, it must be taken for granted to be true, and then it appears on this declaration that the plaintiff has sustained a damage from the defendant's negligence. We think, therefore, the judgment cannot be arrested, but the plaintiff must have a verdict for nominal damages. There was another question, as to whether it was necessary to set forth the return day of the writ in the declaration. We consider that it is the sheriff's

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duty to arrest the party at the first opportunity; and if he does not arrest as soon as he can, he is guilty of negligence, and will be answerable for any damage arising from that negligence. The judgment, therefore, cannot be arrested on that ground. The rule must therefore be discharged, but the verdict must be reduced to 40s.

Rule accordingly.

KEEN v. SMITH.

Where a defendant obtains an order to stay proceedings on payment of debt and costs; allowing the costs of entering and passing the record, is a matter entirely within the Master's discretion.

THIS was an action by the payee against the maker of a promissory note. On the 4th of November last the issue was joined, and delivered with notice of trial for the second sittings in this term, which was on the 22nd of November. On the 10th of November the record was entered and passed, and on the following day the defendant obtained a summons to stay proceedings upon payment of debt and costs, which was agreed to. The Master, on taxation, refused to allow the plaintiff the costs of entering and passing the record, as he conceived that that step was taken much earlier than was requisite.

Kelly now moved for a rule to shew cause why the Master should not review his taxation. He contended that, as the entering and passing the record was the next step after notice of trial, the plaintiff was justified in doing so at any time, since he could have no idea of the intention of the defendant to settle the action.

Barstow shewed cause in the first instance.—Considering the nature of the action, the record was entered and passed much too early. If, as soon as notice of trial is given, the plaintiff is to be held entitled to enter and

pass the record, a defendant will be put to much unnecessary expense. The passing the record eleven days before the time of trial in an action by the payee against the maker of a promissory note is far too soon. At all events, it is a matter which should be left to the Master's discretion.

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Kelly, in support of the rule, contended that this was not a question upon which the Master was to exercise his discretion. If there had been any vexatious proceeding on the part of the plaintiff, the case might have been different; but here the defendant had never intimated to the plaintiff any intention to settle the action, but, on the contrary, had taken every step to induce him to suppose he meant to defend it.

PARKE, B.—I think the Master ought to exercise his discretion upon the nature of the case, and the probability, from the number of causes, of its being tried.

ALDERSON, B.—The record should be passed a reasonable time before the sittings, and the Master is to judge of that.

LORD ABINGER, C. B.—I should have been better satisfied if the defendant had intimated his intention to settle; but I think it should be left to the Master's discretion.

On a subsequent day, the Lord Chief Baron said he had consulted the Judges of the other Courts, and as there seemed to be a different practice, they would probably take into consideration the propriety of making some rule on the subject.

Rule discharged.

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GOODEE v. GOLDSMITH.

To counts for money had and received, and on an account stated, the defendant pleaded non-assumpsit, except as to 3*l.* 5*s.*; set-off, except as to 3*l.* 5*s.*; and payment of 3*l.* 5*s.* into Court. The plaintiff admitted the set-off, took the money out of Court, and declined further to prosecute his action:—Held, that the defendant was entitled to the costs of the two first issues.

ASSUMPSIT for money had and received, and for money due on an account stated. The defendant pleaded—*first*, non-assumpsit, except as to 3*l.* 5*s.*, parcel of the monies in the declaration mentioned; *secondly*, a set-off, except as to 3*l.* 5*s.*, parcel, &c.; *thirdly*, payment of 3*l.* 5*s.* into Court. Replication.—That plaintiff, protesting that defendant did promise in manner and form as the plaintiff hath above thereof complained against him, nevertheless, for replication in this behalf as to the said second plea, the plaintiff admits that before and at the commencement of the suit, he was and still is indebted to the defendant in a sum of money equal to the damages sustained by him, the plaintiff, by reason of the non-performance by the defendant of the promises in the declaration mentioned, except as to the said sum of 3*l.* 5*s.*, parcel &c.; and he, the plaintiff, is ready and willing to set-off and allow to the defendant the full amount of the said damages, and will not further prosecute the suit against the defendant, except as to the said sum of 3*l.* 5*s.*, parcel &c.; to the third plea, the plaintiff replied by accepting the money paid into Court. The plaintiff, by his particulars, claimed 28*l.* 5*s.* for money received by the defendant for the use of the plaintiff. The defendant claimed a set-off of above 25*l.* for money paid on account of the plaintiff. Upon taxation, the Master taxed the plaintiff's costs, but refused to tax the defendant his costs. *Kelly* having obtained a rule nisi to refer it to the Master to tax the defendant's costs upon the two first pleas,

Ogle shewed cause, and contended that the plaintiff was entitled to the whole costs. It was true his real claim, after allowing the set-off, was only 3*l.* 5*s.*, but he was compelled to sue for the whole 28*l.* 5*s.*; for otherwise

the defendant's set-off would have covered the real amount due. Besides, the plaintiff could not tell that the defendant would pay money into Court. The defendant ought not to have put the plea of non-assumpsit on the record, with the pleas of set-off and payment; for, by so doing, he has compelled the plaintiff to enter a nolle prosequi on the first issue.

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PARKE, B.—The rule must be absolute. The plaintiff is entitled to all the costs of that part upon which the money is paid into Court, and the defendant to the costs on the other issues. The replication amounts in effect to a nolle prosequi. The plaintiff has abandoned his cause of action upon the general issue, and the set-off. The act of Parliament (a) is in such cases imperative.

Rule absolute.

(a) 3 & 4 Will. 4, c. 42, s. 33.

WHITE v. IRVING.

PETERSDORFF moved for a rule to shew cause why the bail-bond given in this case should not be delivered up to be cancelled, on the defendant's entering a common appearance. The defendant had been arrested upon an affidavit of debt which was not intituled in any Court; and the jurat of which was as follows:—"Sworn before me, at the house No. 18, Flint Street, in the City of Dublin, under and by virtue of a commission from his Majesty's Court of Exchequer and Common Pleas in England, to me directed, for taking affidavits in Ireland, and I know the deponent." It was submitted that this affidavit could not be used in either Court; and also, that perjury could not be assigned upon it, inasmuch as it would be necessary to allege in the indictment the intention of the plain-

An affidavit of debt not intituled in any Court, was stated to be sworn before a person appointed by virtue of a commission from the Court of Exchequer and Common Pleas:—Held, sufficient, and that it might be used in either Court.

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tiff to use the affidavit in a particular Court. It also appeared from the jurat, as if the commissioner, before whom it was sworn, was appointed by a joint commission from two Courts.

PARKE, B.—The affidavit may be made use of in either of the Courts.

LORD ABINGER, C. B.—In an indictment for perjury, it would be sufficient to aver that the plaintiff intended to use the affidavit to cause the defendant to be arrested.

Rule refused.

DOE *d.* THRELLFORD *v.* WARD.

A prisoner in execution more than twelve months, for a sum under 20*l.*, the damages in ejectment, is entitled to be discharged under the 48 Geo. 3, c. 123, s. 1.

BUTT moved to discharge a prisoner under the 48 Geo. 3, c. 123, s. 1. The defendant had been in execution for more than twelve months for the nominal damages in an action of ejectment which did not exceed 20*l.* It was doubtful whether such a case was within the meaning of the act, *Doe v. Reynolds* (a), though there was a late decision precisely in point (b).

PARKE, B.—There have been contrary decisions, but the defendant is clearly entitled to be discharged.

LORD ABINGER, C. B.—Is not a judgment in ejectment for the damages and costs?

Rule absolute.

(a) 10 B. & C. 481. (b) *Doe v. ———*, ante, Vol. 1, p. 69.

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SALTER v. YEATES.

THIS was an action for work and labour. The plaintiff, by his particulars, claimed 104*l.* 12*s.* for the whole amount of the work, and gave the defendant credit for 30*l.* paid on account. The defendant paid into Court 45*l.* In Easter Term last, the cause was referred to an arbitrator, who was to certify the value of the work done by the plaintiff. On the 8th of October last, the arbitrator certified as follows:—"I, having been appointed to survey and value the several works done by Salter for Yeates, and to ascertain the fair amount to be paid by Yeates to Salter for the same, do hereby certify, that I am of opinion that the sum of 74*l.* was and is the fair value of the same, to be paid by the said Yeates to the said Salter, for and in respect of the said work." *Kelly* having obtained a rule to enter a verdict for the defendant upon this certificate—

Where a cause is referred without an order of *Nisi Prius* to an arbitrator to certify, it is not necessary that he should make his certificate within the time within which the jury process is returnable.

Humfrey shewed cause; and, in the first instance, contended that the meaning of the certificate was, that 74*l.* was still due to the plaintiff, in addition to the money already paid: but the Court being clearly of opinion that the certificate applied to the valuation of the whole work; *Humfrey* then objected that the certificate should have been made within the time within which the writ of *dingas juratores* was returnable. The jury process was returnable in Easter Term, but the arbitrator did not make his certificate until October. This was different from the case of a reference under an order of *Nisi Prius*, for here the arbitrator's certificate is in fact the finding of the jury.

PARKE, B.—It is impossible that the parties could have meant that the arbitrator must make his certificate

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within such time as the jury process was returnable, since it appears to be returnable the next day. It has been decided, that where there is no time named, the arbitrator may make his award at any time. There is no difference whether the reference is by order of Nisi Prius or not: where there is a certificate, it is done to save the expense of the stamp and the award. The rule must therefore be absolute.

Rule absolute.

MARSTON v. HALLS.

No proceedings can be taken on a judgment after writ of error sued out, and note of allowance served. If the writ is improperly sued out, the proper course is to move to set it aside.

PETERSDORFF moved to bring up the defendant for the purpose of charging him in execution;

Wordsworth shewed cause, in the first instance, upon an affidavit, which stated that a writ of error had been sued out, and a copy of the note of allowance thereof duly served on the plaintiff's attorney.

Petersdorff.—The writ has been sued out for the mere purpose of delay.

PARKE, B.—Then you should make an application to discharge the writ of error. As soon as a writ of error is sued out, it paralyzes any proceedings on the judgment. If the writ is irregularly or improperly sued out, you ought to move to set it aside.

Petersdorff took nothing by his motion.

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KELLY v. FLINT.

THIS was an action for dilapidations: the defendant had paid money into Court, and the plaintiff replied further damage.

George having obtained a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to a peremptory undertaking, *Peacock* shewed cause upon an affidavit, which stated that the plaintiff's default arose from the illness of a material witness. It also appeared that the plaintiff was desirous of accepting the money paid into Court in discharge of the cause of action.

PER CURIAM.—The rule may be discharged upon the plaintiff undertaking to amend his replication by accepting the money paid into Court, and paying the defendant all the costs incurred by him subsequently to the payment of money into Court.

Rule accordingly.

JENKINS v. CREECH.

SEWELL moved for leave to add a plea to the record. The action was brought on a banker's check, and the defendant had pleaded but one plea, viz. that the check was given for a gambling debt. He was now desirous of also pleading that the check was drawn more than fifteen miles from the place where the banker resided, and consequently it would not be exempted from stamp duty by the 9 Geo. 4, c. 49, s. 15.

Where, to an action on a check, the defendant pleaded but one plea, which admitted the making the check, the Court refused to permit him also to plead that the check required a stamp.

PER CURIAM.—We cannot now allow you to add this plea. Any plea which denied the drawing of the check would have raised this objection as to the stamp.

Rule refused.

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ALDERSON v. JOHNSON.

The statement of quo minus in a declaration is merely surplusage, and not a ground of special demurrer; the proper course is to apply to a judge at chambers to strike it out.

THE declaration commenced by stating, that G. D. Alderson, a debtor to our Sovereign Lord the now King, cometh before the Barons of his Majesty's Exchequer on the day of , by J. H., his attorney, and giveth the Barons to understand and be informed that since the suing out of the said writ one G. D. named in the said writ died: it then proceeded to set out the cause of action, and concluded "to the damage of the plaintiff, whereby he is the less able to satisfy our said Lord the King the debts which he owes his Majesty at his said Exchequer." Demurrer; assigning for cause that the declaration was insufficient, inasmuch as the commencement and conclusion improperly stated the ancient and abolished fiction of quo minus.

Crowder, in support of the demurrer.—The declaration is bad in form. 3 Reg. Gen. M. T., 3 Will. 4 (a), requires that every declaration shall in future commence according to the form there prescribed.

PER CURIAM.—It is clearly only surplusage. The proper course is to apply to a judge at chambers to strike it out.

Judgment for plaintiff.

(a) Ante, Vol. 1, p. 475.

HEALE v. CURTIS.

Where issue was joined after Easter Term, and it did not appear whether it was a country or a town cause, a motion for judgment as in case of a nonsuit in Michaelmas Term, was held too early.

MELLOR shewed cause against a rule obtained by *Thomas* for judgment as in case of a nonsuit. Issue was joined on the 10th of May last, two days after Easter Term; but it did not appear from the affidavit upon which the rule was granted, whether it was a town or

case of a nonsuit in Michaelmas Term, was held too early.

country cause. It was objected that the application was premature, and *Wingrove v. Hodson* (a) was referred to.

PER CURIAM.—The application is made too early.

Rule discharged with costs (b).

(a) Ante, Vol. 2, p. 379.

(b) See *Williams v. Edwards*, ante, Vol. 3, p. 183.

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CURTIS.

RAY v. GOOD.

SEWELL shewed cause against a rule obtained by *Petersdorff* for judgment as in case of a nonsuit for not proceeding to trial. It appeared that the similitur was delivered intituled in the King's Bench instead of this Court; and it was therefore objected that issue was not joined.

A similitur intituled in a wrong court is a nullity, and therefore in such case there can be no issue joined to warrant a motion for judgment as in case of a nonsuit.

PER CURIAM.—There is clearly no issue, the similitur was a nullity.

Rule discharged.

HANSLOW v. WILKS.

IN this case notice of trial had been given for twelve o'clock at the Court House at Stafford. The defendant's attorney went to the Court House with his witnesses a quarter before twelve on the appointed day, when he found that the cause had been tried at eleven o'clock, and a verdict found for the plaintiff. *Busby* having obtained a rule to set aside the verdict for irregularity—

Where a cause was tried in the absence of defendant's attorney before the time specified in the notice of trial, the Court set aside the verdict without an affidavit of merits.

W. H. Watson shewed cause, and objected that no affidavit of merits was produced in support of the application. He referred to *Blackhurst v. Bulmer* (a), and *Sprigge v. Rutherford* (b).

(a) 5 B. & A. 907.

(b) Ante, Vol. 2, p. 429.

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PER CURIAM.—In such a case as this an affidavit of merits is by no means necessary. The rule must be absolute with costs.

Rule accordingly.

PUTNEY v. SWAN.

The declaration consisted of a count against defendant, as acceptor of a bill of exchange, and another count on an account stated: defendant pleaded, that he did not accept the bill in the declaration mentioned:—

Held, that as the plea was not, in terms, confined to the first count, it must be taken to be pleaded to the whole declaration, and, therefore, bad on special demurrer. The 9th rule of H. T., 4 Will. 4, means, that pleas, without the formal parts, must be taken to be pleaded in bar, in contradistinction of further maintenance.

THE declaration contained a count on a bill of exchange accepted by defendant, and a second count on an account stated. Plea—"The defendant, by *F. J.* his attorney, says, that he did not accept the said bill of exchange in the said declaration mentioned, *modo et formâ*." Demurrer, assigning for cause that the plea professed to be an answer to the whole declaration, but was, in fact, an answer to the first count only.

Francillon, in support of the demurrer.—The plea, being without the formal parts of the commencement and conclusion, must be taken to be pleaded in bar of the whole action (*a*), and consequently is bad, as affording no answer to the count on the account stated. [*Parke*, B.—The 9th rule of H. T. 4 Will. 4 (*a*) means, that where a plea is without such formal parts, it must be taken to be pleaded in bar of the action, as contradistinguished from further maintenance of the action.] In *Worley v. Harrison* (*b*), there were two counts, as in the present case, and the defendant pleaded, that he did not make the promissory note in the first count mentioned; the Court were inclined to think that, though the plea expressly referred to the first count, and answered that only, it must be taken as pleaded to the whole declaration. In *Vere v. Goldsborough* (*c*), the declaration was the same as the present.

(*a*) R. H. T. 4 Will. 4, ante, Vol. 2, p. 319.

(*b*) 3 A. & E. 669.
(*c*) 1 Scott, 265.

The defendant, without obtaining leave to plead several matters, pleaded that he did not accept the bill in the declaration mentioned, and that he did not account with the plaintiff; the plaintiff having signed judgment for want of a plea, it was held, that the objection should have been taken by special demurrer.

The Court then called upon

Chadwick Jones, in support of the plea. In *Worley v. Harrison*, the Court did not expressly decide this point, but gave judgment on the ground that the defendant had treated the instrument set out in the first count as a promissory note. The plea is good for that part of the declaration to which it is applicable; and if it does not cover the whole, the plaintiff should have signed judgment on the last count. *Vere v. Goldsborough* merely decided, that the two pleas there pleaded were not a double plea, within the meaning of the rule of Court.

LORD ABINGER, C. B.—There must be judgment for the plaintiff. The objection is matter of form; but, it appears from the authorities, that, by the strict rules of pleading, if a defendant means to answer a part of the declaration only, he ought so to allege it in his plea.

PARKE, B.—As this plea is not expressly confined to one count, it must be taken to be pleaded in answer to the whole declaration. The 9th rule of H. T. 4 Will. 4, seems to have been generally misunderstood. The object of that rule was, to prevent unnecessary statements in pleading; and when it is said, that pleas without the formal parts shall be taken to be pleaded in bar of the whole action, it must be understood that they are pleaded in bar in contradistinction to further maintenance.

ALDERSON and GURNEY, Bs., concurred.

Judgment for the plaintiff.

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**HAYTER v. ELEANOR MOAT, Administratrix of
THOMAS MOAT.**

In indebitatus assumpsit, the statement of the "promise" is a material allegation, and the omission of it is not cured by verdict, but is ground for arresting the judgment. The defect may, however, be cured by any plea which admits a promise.

A count, stating defendant to be indebted as administratrix, in respect of the funeral of the intestate, cannot be joined with counts on promises by the intestate.

Where some of the counts of a declaration are good, and others defective, and separate damages have been assessed on each count; the Court will only arrest the judgment on the defective counts: *aliter*, if the verdict was general.

ASSUMPSIT.—The two first counts were on bills of exchange drawn by the plaintiff upon, and accepted by, Thomas Moat in his lifetime. Third count—that Thomas Moat in his lifetime was indebted to the plaintiff for goods sold and delivered by the plaintiff to Thomas Moat at his request. Fourth count—for work done and materials provided by the plaintiff, for Thomas Moat in his lifetime. Fifth count—for money paid by the plaintiff for the use of Thomas Moat in his lifetime. Sixth count—on an account stated between the plaintiff and Thomas Moat in his lifetime—that Thomas Moat in his lifetime, in consideration of the premises respectively last mentioned, promised the plaintiff to pay him the four several sums of money respectively last mentioned, on request; but that neither T. M. in his lifetime, nor the defendant, as administratrix as aforesaid, since the death of T. M., have paid the said several four sums of money, or any part thereof. Seventh count—that afterwards, and after the death of T. M., the defendant, as administratrix, was indebted to the plaintiff in 200*l.* for work and labour, as an undertaker, in and about the funeral of the said T. M. Eighth count—for goods sold and delivered by the plaintiff to the defendant as administratrix. Ninth count—on an account stated with the defendant as administratrix, for money due from the intestate: that defendant, as administratrix, in consideration of the premises respectively last mentioned, promised the plaintiff to pay him the *said two several sums of money respectively last mentioned*. Yet the defendant hath not paid the same, or any part thereof. First plea—that defendant did not accept the bills in the first and second counts respectively mentioned; to third, fourth, fifth, and sixth counts, that defendant

did not promise; and as to the residue of the declaration, that defendant did not promise. The defendant pleaded a judgment recovered puis darrein continuance, to the first, second, third, fourth, fifth, sixth, and two last counts, upon all of which, except the eighth, the plaintiff took judgment of assets quando; and upon the eighth count he entered a nolle prosequi. The cause went to trial upon the plea of non-assumpsit to the seventh count, and was referred to an arbitrator, who was to certify what damages were to be assessed upon the respective counts.

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Crowder having obtained a rule to arrest the judgment on the seventh count, on the ground that there was no promise to that count; or to arrest the judgment generally, on the ground that there was a misjoinder of the causes of action, inasmuch as the seventh count charged the defendant in her personal capacity—

Platt and Gurney shewed cause.—It is not necessary to allege in the declaration a conclusion of law, which arises from the statement of the consideration passing from the plaintiff to the defendant. The promise is a mere inference of law drawn from the premises. If one party supplies goods to another, who receives them, the law infers a promise, upon which the latter may be compelled to pay. But here the defendant herself has laid a promise. She says she did not promise in manner and form as alleged. [*Parke, B.*—It might be laid by some plea which admits a promise, but that plea does not.] After verdict the Court will intend a promise was found by the jury. Where the plaintiff declared on three several promises, but the last count omitted to say that the defendant had promised, it was held sufficient; for, as it had been positively alleged in the first count, the same nominative would go to all the promises. *Gatehouse v. Row (a)*.

(a) Raym. 145; S. C. 5 Mod. 305.

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PARKE, B.—What is there in this seventh count that makes it imperative to prove the goods were to be paid for on request? If it had been stated, that the goods were to be paid for on request, the law would imply a request; but it is quite consistent with this statement, that they might be sold on credit. The effect of the plea is only to deny the promise in those places where it is alleged. The judgment must be arrested on the seventh count.

Crowder then submitted, that the judgment should be arrested generally, on account of the misjoinder of the causes of action. The ninth count might be joined with the first six (a); but the seventh count could not be joined either with the first six, or with the ninth. [*Parke, B.*—The question is, whether this objection may not be cured by entering a nolle prosequi.] It is too late, after verdict, for the plaintiff to say he will take judgment on a particular count.

LORD ABINGER, C. B.—The reason why one bad count vitiates the whole declaration is, that the jury having given a general verdict, it cannot be known what damages they have assessed on each particular count; but here, the arbitrator, by his certificate, assesses the separate damage on each count. The judgment must be arrested on the seventh count, and stand for the plaintiff on the other counts.

Judgment accordingly.

(a) 2 Saund. 117 c; *Sacer v. Atkinson*, 1 H. Bl. 102.

HOBY v. PRITCHARD.

A motion to set aside a Judge's order can only be made on producing a copy of the order.

CHANDLESS moved to set aside a Judge's order. He had not then a copy of the order; but there did not

appear to be any rule which rendered it necessary to have a copy at the time the motion was made.

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v.

PRITCHARD.

Lord ABINGER, C. B.—If you have not a copy of the order you move to set aside, you are not in a situation to make the motion.

Hoby and Eccles v. Pritchard.

IN this case, the plaintiffs were jointly indebted to their attorney for business done in conducting this suit. Hoby, without the consent of Eccles, had taken out a summons before *Gurney*, B., at chambers, to refer the bill for taxation, upon giving the usual undertaking. It was objected, that the application could not be made by one of two persons jointly liable; but the learned Judge thought, that, upon the construction of the 2 Geo. 2, c. 23, the undertaking of one person was sufficient, and made the order.

A judge has no power to refer an attorney's bill for taxation, upon the undertaking of one of two persons jointly liable; but if there are sufficient grounds, a special application should be made to the Court for that purpose.

Chandless now moved to set aside this order.—The 2 Geo. 2, c. 23, s. 23, enables the Judges to refer an attorney's bill for taxation, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum that, upon taxation, shall be found to be due. From the language of this act, the attorney is clearly entitled to have the undertaking of both parties liable on the bill. Where business is done on a joint retainer, it is not sufficient to deliver a bill to one. *Finchett v. How* (a).

Addison shewed cause.—The undertaking of the one

(a) 2 Camp. 277.

1836.

Hoby
v.
PRITCHARD.

party binds the other. In an action on a promissory note, against a principal and surety, an acknowledgment by the principal would, before the 9 Geo. 4, c. 14, have been sufficient to take the case out of the statute as against the surety, and since that act, payment by the principal would do so. [Lord *Abinger*, C. B.—Although one party may bind another in a mercantile transaction, it does not follow that he can make him liable to an attachment.] The words of the 2 Geo. 2, c. 23, s. 23, are, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized. [*Parke*, B.—That means a person duly authorized by both to enter into the agreement.] In *Watson v. Postan* (a), it was held, that, in an action on an attorney's bill against two, a Judge might, in his discretion, on the application of one defendant, order the bill to be taxed without such defendant giving the usual undertaking.

LORD ABINGER, C. B.—If you had made a special application for that purpose, the Court might have entertained it, upon sufficient grounds; but here, an order is made to tax, upon the application of one, the effect of which is to give a remedy against the other, which he cannot answer.

PARKE, B.—You should have made a special application to the Court.

Rule absolute.

(a) 2 C. & J. 370.

EDWARDS, Administrator, v. CRACE.

A count for work done by the plaintiff as administrator, may be joined with counts on promises to the intestate.

THE declaration contained counts for goods sold, work and labour, and money due on an account stated with the intestate, and promises to pay the intestate. It then pro-

ceeded to state, that the defendant was indebted to the plaintiff *as administrator*, for work done by the plaintiff as administrator, and laid the promise to the plaintiff as administrator. The defendant demurred specially, assigning for cause, that a count on a cause of action accruing to the plaintiff since the death of the intestate, could not be joined with counts on promises by the intestate.

1836.
 EDWARDS
 v.
 CRACE.

Thomas, in support of the demurrer.—The general rule for determining what demands may be joined, is, to consider whether the sum, when recovered, would be assets. *Cowell v. Watts* (a), *Ord v. Fenwick* (b). The work done by an administrator, after the death of the intestate, could never be assets.

[*Abinger*, C. B.—Suppose the work was done in finishing a coat commenced by the testator, and which he was bound to finish, it would, in effect, be assets. *Parke*, B.—The administrator may think it for the benefit of the estate, to go on with the work which the testator was bound to fulfil. *Alderson*, B.—In order to support your argument, you must make out that an administrator can, in no case, carry on the work of a testator, and recover for it. *Abinger*, C. B.—A man may make a specific contract, and if he does not conclude it, he could not recover at all; take the case of a well, and the testator dies before it is finished. *Parke*, B.—How do we know that the work is not done by workmen employed by the administrator, and paid out of the assets. If there is such a case, there is no misjoinder. *Marshal v. Broadhurst* (c) is an authority, to shew that there may be a debt with an executor, for work done by him as executor].

Judgment for the plaintiff.

(a) 6 East, 410.

(b) 3 Ea. 104.

(c) 1 C. & J. 403.

1836.

SIMPSON v. HURDIS.

The 7th rule of H. T. 4 Will. 4, has not deprived a Judge of the power of certifying, under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, where there are several issues.

THIS was an action for libel.—The defendant pleaded the general issue, and also that the supposed libel was a privileged communication. At the trial of the cause before *Gurney*, B., the jury found a general verdict for the plaintiff, with 1*s.* damages, and the learned Judge certified, under the 43 Eliz. c. 6, s. 2.

Erle now moved for a rule to shew cause why the Master should not review his taxation, on the ground that, notwithstanding the certificate, the plaintiff was entitled to the costs of the special plea. By the 3 & 4 Will. 4, c. 42, s. 1, the Judges were empowered to make rules respecting pleadings: and by the 7th rule of H. T. 4 Will. 4, it is ordered, that if, upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint, in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleading. As this rule was made in pursuance of a power given by statute, it has the force of an act of Parliament, and in effect repeals the 43 Eliz. c. 6. If the defendant had succeeded on the general issue, the plaintiff would, under this rule, have been entitled to the costs of the special plea and witnesses; so that, by having a general verdict, he is in a worse situation than if the verdict had been against him on the first issue.

LORD ABINGER, C. B.—It was clearly never intended to overrule the statute of Elizabeth.

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HURDIS.

PARKE, B.—This rule does not repeal the statute of Elizabeth.

ALDERSON, B.—The plea was an unnecessary one, and you might have applied to a Judge at chambers to strike it out.

Rule refused.

BARBER and Another, Assignees of MARSH, v. WILKINS.

UDALL having obtained a rule for judgment as in case of a nonsuit, *Jervis* shewed cause upon an affidavit of the plaintiff, in which he swore that he knew nothing of the present proceedings, and that he never instructed any person to commence or prosecute any action at law against the defendant.

It is no answer to a rule for judgment as in case of a nonsuit, that the proceedings were commenced against the defendant without the plaintiff's authority.

Udall, in support of the rule, referred to *Muday v. Newman* (a).

PARKE, B.—The rule must be absolute, unless the plaintiff consents to give a peremptory undertaking.

Rule accordingly.

(a) Ante, Vol. 2, p. 695; S. C. 1 C. M. & R. 402.

HOWEN v. CARR.

HUMFREY moved for a rule to shew cause why one of several pleas should not be struck out. The action

Where a plaintiff has consented to a rule to plead several

matters, the Court will not entertain an application to set aside any of these pleas.

1836.

HOWEN

v.

CARR.

was brought by the plaintiff as indorsee against the defendant as acceptor of a bill of exchange. The defendant pleaded, amongst other pleas, that the drawer of the bill, at the time she drew it, was a married woman. It was submitted that it was not competent for the acceptor of a bill, who permits his name to go abroad, to plead that the drawer was a married woman. In *Gilmore v. Hague* (a), which was an action by the indorsee against the acceptor of a bill of exchange, the Court refused to permit the defendant to plead that it was not indorsed by the drawer to the plaintiff.

PER CURIAM.—As it appears there has been a rule to plead several matters, the application should have been to discharge that rule. As you have consented to the rule, you are concluded by that.

Rule refused.

(a) Ante, Vol. 4, p. 303.

BERRIDGE v. PRIESTLY.

A reference in the margin of a demurrer to the causes specially set out, is a sufficient compliance with R. H. T. 4 Will. 4.

Plaintiff declared for work as an attorney and solicitor.

Defendant pleaded two pleas, only answering the plaintiff's claim as attorney; the plaintiff demurred,

referring in the margin of his demurrer to the causes assigned. A judge having ordered the demurrer to be set aside, the Court rescinded the order.

HUMFREY moved to set aside an order of Mr. Baron Gurney. The plaintiff declared for work and labour as an attorney and solicitor. The defendant pleaded—first, that the plaintiff was not at the time the causes of action accrued an attorney of the Court of Exchequer; secondly, that plaintiff employed the defendant to act as an attorney on his behalf in the prosecution of a certain cause; and that defendant gave up the cause without reason, and without notice. To these pleas the plaintiff demurred specially, and assigned for cause, that, as the declaration was for work done as an attorney and solicitor, the pleas only answered that part which was done as an

attorney, and were no answer to that part of the work which was done as a solicitor. The particulars stated the action to be brought to recover the sum of 61*l.* for business done by the plaintiff between the months of June and October inclusive, as the attorney *and solicitor* of the defendant. An application was made to the learned Baron at chambers, to strike out the demurrer as frivolous; and he ordered that the declaration be amended by omitting the word "solicitor," and that the demurrer be set aside. It was submitted, that, as the plea professed to answer the whole declaration, and answered only a part, there was good cause of demurrer, and the learned Baron had no jurisdiction to set it aside.

1836.
BERRIDGE
v.
PRIESTLY.

Gaselee shewed cause, and contended that the learned Judge was justified in setting aside the demurrer, inasmuch as the points intended to be argued were not properly stated in the margin of the demurrer, pursuant to R. H. T. 4 Will. 4 (a). The statement in the margin was, that "the pleas are bad for the causes specially assigned for demurrer."

PARKE, B.—It has been decided, in several cases, that such statement in the margin of a demurrer is sufficient. The rule must be absolute.

Rule absolute.

(a) Ante, Vol. 2, p. 304.

BAILEY, Assignee of CALLIS, v. CHITTY.

DEBT for goods sold and delivered, work and labour, and on an account stated. Pleas—*nunquam indebitatus*, the statute of limitations, and a set-off. At the trial of
To bring a case within the 23 Geo. 2, c. 33, the cause of action must arise within the county of Middlesex.

1836.

BAILEY
v.
CHITTY.

the cause before the under-sheriff of Middlesex, the plaintiff proved a claim for goods sold by Callis to the defendant, and also that Callis had been employed by the defendant to levy a distress for rent due to him in the county of Surrey. The jury found a verdict in favour of the plaintiff for 1*l.* 19*s.* 9*d.* debt, and 1*s.* damages. *Platt* having obtained a rule for leave to enter a suggestion on the roll to deprive the plaintiff of costs, under the 23 Geo. 2, c. 33 (the Middlesex Court of Requests' Act),

Miller shewed cause.—First, the original claim of the plaintiff was 4*l.* 19*s.* 3*d.*, which was reduced by the plea of the statute of limitations to the amount for which the verdict was given. In *Horn v. Hughes* (a), Lord Ellenborough says, "It is unnecessary to say what we might have thought, if it had appeared that the plaintiff had a reasonable ground for bringing his action for more than 5*l.* In the present case, the plaintiff clearly had a reasonable ground for suing in the superior Court; for how could he tell that the defendant would plead the statute?" The judgment in *Horn v. Hughes* is recognised by Dallas, C. J., in *Hersant v. Larkin* (b). Secondly, the cause of action arose in the county of Surrey. The 23 Geo. 2, c. 33, has not extended the jurisdiction of the old County Court, but the 4th section expressly provides, that no person shall be liable to be summoned at the suit of the plaintiff, other than such person as was liable to be summoned to the County Court of Middlesex before that act was made. It is clear the sheriff could not hold a plea of debt for a cause of action arising out of his county (c). In *Welsh v. Proyte* (d), it was expressly decided, an action cannot be brought in a County Court, unless the cause of action arise within the county. That decision was fol-

(a) 8 East, 348.

(c) Dalton's Sheriff, c. 110, p. 412.

(b) 3 B. & B. 263.

(d) 2 H. Black. 29.

lowed by *Tubb v. Woodward* (a), *Busby v. Fearon* (b), *Smith v. O'Kelly* (c), and the same law is stated in Tidd's Practice (d). Thirdly, the sum recovered, together with the damages, is above 40s. The 19th section enacts, that, in case any action of debt or assumpsit shall be prosecuted in the superior Court, and the defendant shall reside within the county of Middlesex, and shall be liable to be summoned to the County Court, and the jury shall find the *damages* for the plaintiff under 40s., then he shall not be entitled to costs. The word damages cannot, in the present case, be confined to the 1s., but must mean the debt and damages taken together, which amount to 2l. 0s. 9d. [*Alderson, B.*—If you construe the 19th section literally, you have only 1s. damages; if you give it a free construction, you must leave the 1s. altogether out of the case; you cannot have both the letter and the spirit].

1836.
BAILEY
v.
CHITTY.

The Court intimated to *Platt* to confine himself to the second objection.

Platt, in support of the rule, contended, that it was immaterial where the work was done, as the plaintiff sued on a promise to pay, arising from the performance of the contract.

PER CURIAM.—To bring a case within the act, the cause of action must arise within the county.

Rule discharged, with costs.

(a) 6 T. R. 176.
(b) 8 T. R. 236.

(c) 1 B. & P. 75.
(d) 4th ed. p. 516.

1836.

RAY v. DOW.

A *distringas*, with a view to outlawry, may issue in continuation of writs previously sued out to save the Statute of Limitations.

CHILTON moved for a *distringas* with a view to proceed to outlawry. Writs of summons, alias and pluries, had successively issued, for the purpose of preventing the operation of the Statute of Limitations, and had been regularly returned and entered of record, as required by the statute (a). Under these circumstances the officer had doubted whether he should be justified in sealing the *distringas* without the sanction of the Court, conceiving, that as the plaintiff had elected to issue writs to save the Statute of Limitations, those writs could not be continued by a *distringas* with a view to outlawry. In support of the application it was distinctly sworn that the defendant was resident at Boulogne, and *Fraser v. Case* (b) was referred to.

PARKE, B.—I see no reason why a *distringas* may not issue to continue the process. The 10th section of the 2 Will. 4, c. 39, enacts, that no writ shall be in force for more than four calendar months, but every writ of summons and *capias* may be continued by alias and pluries, as the case may require; it then provides that no first writ should be available to prevent the operation of the Statute of Limitations unless the defendant shall be arrested thereon, or served therewith, or proceeding to or toward outlawry shall be had thereon, or unless the writs have been returned and entered of record. What incongruity is there in the present case in issuing a *distringas* in continuation of the former writs?

Lord ABINGER, C. B.—The 3rd section speaks of a *distringas* issuing for the purpose of outlawry founded on any original writ of summons; it says, that where a party

(a) 2 Will. 4, c. 39, s. 10.

(b) 2 M. & Scott, 720.

does not intend to proceed to outlawry, the Court may authorize an appearance to be entered.

Rule absolute.

1836.

RAY
v.
Dow.

CHANDLER v. BESWALD.

R. V. RICHARDS moved for a rule to shew cause why the plaintiff should not pay to the defendant the costs of not proceeding to trial, and why the subsequent proceedings should not be set aside for irregularity. An order was obtained for trying the cause before the under sheriff of Worcester; and on the 5th of July notice of trial was given for the 12th of August following. On the 9th of August this notice was countermanded, but the cause was subsequently tried on the 17th of August, when the plaintiff obtained a verdict. It was objected that the notice of countermand was one day too late, and also that the record had been altered and was not resealed.

Where notice of trial is countermanded it is not necessary to re-seal the record, unless the return day has passed.

Humfrey showed cause upon an affidavit, which stated that the plaintiff had not proceeded to trial in consequence of the defendant being insolvent, and of an arrangement that proceedings should be stayed, each party paying his own costs. He also contended, that after the cause was tried, the defendant could not object that the record had not been resealed.

PARKE, B.—The Master informs us that it is not necessary to reseat the record without the return day passes.

R. V. Richards having shewn the return of the writ of trial was altered from the 12th to the 19th day of August, the rule was made absolute.

Rule absolute.

1836.

HILTON v. FOWLER.

Where damages found by the jury have been calculated upon a value assented to by counsel on both sides; the Court will not interfere to alter the amount of the verdict on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation.

THIS was an action brought by the plaintiff to recover the damages sustained by him, in consequence of the defendant having neglected to take care of, and provide sufficient pasture for, 500 lambs, pursuant to agreement. At the trial of the cause the jury were clearly of opinion that the plaintiff was entitled to recover, and the only question was the amount of damage. As the basis of calculation, it was suggested by the plaintiff's counsel that the lambs, if properly taken care of, would have been worth 30s. each; and this was acquiesced in by the counsel for the defendant, and the damages assessed accordingly. *Shée* now moved to reduce the damages, on the ground that there had been a mistake as to the value of the lambs. He produced affidavits, in which it was distinctly sworn that the lambs had been valued at too much.

PARKE, B.—The Court cannot interfere. If counsel make a miscalculation, it is but just it should be rectified; but here the objection is that counsel have assumed as the basis of their calculation a higher amount than the real value of the lambs. If there had been any doubt upon it, the question ought to have gone to the jury.

ALDERSON, B.—I do not see what authority the Court has to alter the damages. If the defendant's counsel had thought the value different, the question might have gone to the jury; but instead of that, they consent to a particular average value.

GURNEY, B.—We cannot try this question on affidavits.

Rule refused.

1836.

BAKER v. BROWN.

PETERSDORFF moved to alter the amount of the verdict. It was an action of debt on a mortgage deed for payment of 1025*l.* with interest. The cause was undefended, and at the trial the plaintiff's counsel took a verdict for the principal only, omitting to calculate the interest. It was now sought to amend the verdict by including the interest; and reference was made to *Baldwin and Gwines case (a)*, where the plaintiff being entitled to treble damages, and single only having been found, the Court increased them accordingly.

Where, in an action for principal and interest on a mortgage deed, which was undefended, the plaintiff's counsel took a verdict for principal only, omitting to include the interest, the Court refused to increase the amount of the verdict by adding the interest.

LORD ABINGER, C. B.—The verdict has been entered as it has been taken in Court, and we cannot in the absence of the other party increase it.

PARKE, B.—We can do nothing for you but set aside the verdict: we refused a similar application a few days ago.

ALDERSON, B.—The case cited was a question as to treble damages; and the Court there treated the finding of the jury as the finding of a single verdict.

(a) Godbolt's Rep. 245.

CHARINTON v. MEATHERINGHAM and Another.

THIS was an action against the defendants for irregularities committed by them in levying a distress for poor-rate and highway-rate. At the trial, before Lord *Abinger*, C. B., at the Lincoln Spring Assizes, it appeared that one of the defendants was churchwarden and overseer, and the other a constable acting in his aid; and the learned Judge being therefore of opinion that they were entitled to the

A defendant is not entitled to treble costs under the 43 Eliz. c. 2, s. 19, where the plaintiff is nonsuited in an action for any thing done under the authority of that act.

1836.

CHARINTON
v.
MEATHERING-
HAM.

protection of the 24th Geo. 2, c. 44, nonsuited the plaintiff, the action not having been brought within the six months limited by that act. On taxation the defendants claimed treble costs under the 19th section of the 43 Eliz. c. 2, and the 82nd section of the 13 Geo. 3, c. 78, which the Master allowed.

Miller obtained a rule to shew cause why the Master should not review his taxation.—The defendants are not entitled to treble costs under the 43 Eliz. c. 2. The 19th section enacts, that if any action of trespass, or other suit, shall be brought against any person for taking a distress, making a sale, or doing any other thing by authority of that act, the defendant may plead the general issue and give the special matter in evidence, “and after issue tried for defendant, or nonsuit of plaintiff after appearance, the defendant to recover treble damages by reason of his wrongful exaction in that behalf, with his costs also in that part sustained.” It has been decided in the case of *Butterton v. Furber* (a) that the avowant in replevin on a distress for poor-rates is not entitled to treble costs under the 19th section of the 43 Eliz. c. 2; and a distinction was there taken between the language of that act and of the 2 W. & M. sess. 1, c. 5, where the words are “the persons grieved shall recover his and their treble damages *and* costs of suit.” With respect to defendants’ right to treble costs under 13 Geo. 3, c. 78, that statute was repealed by the 5 & 6 Will. 4, c. 50, at the time the plaintiff was nonsuited.

N. R. Clarke shewed cause, and contended that it was evident from the language of the 19th section of 43 Eliz. c. 2, that the legislature intended a defendant should have treble costs in the event of the plaintiff being nonsuited.

(a) 1 B. & B. 517.

PARKE, B.—It seems to me that the meaning of the 19th section of the 43 Eliz., c. 2, is, that if the defendant has sustained any damage, he may have an action to recover treble that damage, with his costs. The rule must be absolute for the Master to review his taxation.

1836.
CHARINTON
v.
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HAM.

The rest of the Court concurred.

Rule absolute.

PALMER v. WALLER and Another, Executors of WALLER.

THIS was an action against the defendants as executors, on a promissory note made by the testator. The defendants had pleaded several pleas which were found against them, and the plaintiff obtained judgment for 129*l.* debt and 49*l.* 12*s.* costs. A writ had issued, commanding the sheriff to levy the debt and costs de bonis testatoris, to which the sheriff returned nulla bona; and proceedings were then taken by a scire fieri inquiry, to which the sheriff also returned nulla bona. In the course of last term the plaintiff obtained a rule absolute for quashing this return (a), on the ground that there was evidence of a devastavit, and a new scire fieri inquiry was awarded. The defendants then paid the debt and costs, and the sheriff returned to this latter inquiry that he had levied the sum directed, out of the goods of the testator. *Jervis* now moved for a rule to shew cause why the defendants should not pay to the plaintiff the costs of the scire fieri inquiries. In support of the application reference was made to the 34th section of the 3 & 4 Will. 4, c. 42, which enacts, that in all writs of scire facias the plaintiff obtaining judgment on an award of execution shall recover his costs of suit.

In an action against executors, the plaintiff having obtained a verdict, sued out a fi. fa. against the goods of the testator, to which the sheriff returned nulla bona. A scire fieri inquiry then issued, to which the sheriff also returned nulla bona. This return was set aside, on the ground that there was evidence of a devastavit, and a new scire fieri inquiry issued. The defendants then paid to the sheriff the debt and costs in the original action, and he returned that he had levied them out of the goods of the testator:—Held, that the sheriff should be made a party to a rule, to compel payment to the plaintiff of the costs of the two inquiries.

pel payment to the plaintiff of the costs of the two inquiries.

(a) Ante, p. 172.

1836.

PALMER
v.
WALLER.

Chilton shewed cause.—The plaintiff is not entitled to any costs under the scire fieri inquiries. The nature of that proceeding is fully stated in 1 Wms. Saund. (a), and it will be seen that the writ is in execution of the original judgment, and commands the sheriff to levy the debt and damages of the goods of the testator in the hands of the executor, if they can be found, and in case there should be no goods of the testator, he is to summon a jury to inquire if the defendant has wasted the goods of the testator. In the present case the sheriff has returned that he has levied the debt and costs out of the goods of the testator. Before the 3 & 4 Will. 4, c. 42, s. 34, no costs were recoverable on a scire fieri inquiry unless the defendant appeared and pleaded, and that act only applies to cases where there has been a judgment. The return must be taken to be true until the contrary appears, and in that case the remedy would be against the sheriff.

Sir *W. Follett* and *Jervis* in support of the rule.—The defendants have fraudulently paid the money into the hands of the sheriff. When the writ issued directing the sheriff to levy the debt and costs out of the goods of the testator, the sheriff returned nulla bona. The defendants resist the payment in every way until after the return to the first inquiry is set aside, and then they pay the money. [*Parke*, B.—We do not take it that they paid the money, but that the sheriff levied it from the goods of the testator.] It is distinctly sworn that they paid it themselves. If there were any goods of the testator they ought to have pointed them out in the first instance.

PARKE, B.—It seems to me, that the application should be to get the return altered by making the sheriff a party. There ought to be some method of making the defendants

(a) P. 219, n. 8.

pay the costs of the two inquiries, but all that we can do is to set aside the sheriff's return.

Lord ABINGER, C. B.—The better course would be to enlarge the rule in order to make the sheriff a party, and to call on him to shew cause why the return to the last inquiry should not be quashed, unless the costs of the two inquiries are paid; but if he pays the costs of the inquiries, the present rule to be discharged.

1836.

PALMER
v.
WALKER.

Rule accordingly.

WAINWRIGHT v. JOHNSON.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange. The declaration stated the defendant to be summoned by virtue of a writ issued on the 23rd of August 1836. It then proceeded to set out the bill of exchange, which appeared to be due after the time when the writ was stated to have issued, and alleged that the defendant accepted the bill, *and promised to pay the same*, according to the tenor and effect thereof. There was a second count for money due on an account stated, a promise to pay that sum, and a general breach. The defendant demurred specially, assigning for cause that the promise in the declaration was not laid according to the form prescribed by the rules of Trinity Term, 1 Will. 4 (a); and also that it appeared on the face of the declaration, that the cause of action had accrued after the writ issued.

The rule of T. T., 4 Will. 4, as to the averment of the promise where there is a count against the maker of a note, or the acceptor of a bill, and also the common counts, only applies to the latter. Where a demurrer to a declaration is too large, the Court will give judgment for the plaintiff. Semble, in such a case, the plaintiff should enter a nolle prosequi as to the counts which are bad, or the defendant may bring a writ of error.

Crowder, in support of the demurrer.—The rule of Trinity Term, 1 Will. 4 (b), orders, that if the declaration contains one or more counts against the maker of a note, or

(a) Ante, Vol. 1, p. 113.

(b) Ib.

1836.
WAINWRIGHT
v.
JOHNSON.

acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say "promised to pay the said last-mentioned several monies respectively." Here, the promise should have applied to both counts.

PARKE, B.—That rule applies only to several common counts.

Crowder.—There is a second objection, that it appears the cause of action accrued after the writ issued.

PARKE, B.—That is a valid objection, but the demurrer is too large, it should have been confined to the first count only. Therefore we must give judgment for the plaintiff generally.

Crowder.—The plaintiff is not entitled to a general judgment, but only to judgment for such part as is good. In Com. Dig. (a) it is stated, that if there are several counts in the same declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so much as is good. The same rule is also laid down in Williams' Saund. (b). If the plaintiff enters up judgment generally, there would be error upon the face of the record.

LORD ABINGER, C. B.—Can we prevent the plaintiff from entering a nolle prosequi as to the first count? He must enter his judgment as he is advised.

PARKE, B.—We give judgment for the plaintiff generally. If he enters judgment upon any count which is bad, the judgment will be erroneous.

Judgment for the plaintiff.

(a) Tit. Pleader (Q 3).

(b) Vol. 1, p. 285, b. n. 9.

1836.

MORANT v. SIGN.

TROVER for goods and chattels, to wit, trees, bushes, and bark of trees. Plea, that defendant, before the time when, &c., was seised in his demesne as of fee, of and in a certain close called, &c., (setting out the abuttals); and being so seised, he, the defendant, on the day and year last aforesaid, cut one oak tree, one other tree, and two cartloads of bushes, then respectively growing and being in and upon the said close, and then cut and stript from the said other tree, 500 weight of bark, which oak tree, bushes, and bark, and which other tree so stript of its bark as aforesaid, are the same goods and chattels in the declaration mentioned: and the defendant further says, that afterwards, and before the said time when, &c., to wit, &c., he, the defendant, delivered the said goods and chattels to one Richard Roe, to be kept by the said Richard Roe to and for the use of him the defendant, and the said Richard Roe afterwards, and before the said time when, &c., to wit, &c., delivered the said goods and chattels to the plaintiff, whereupon the defendant at the said time when, &c., took the said goods and chattels from and out of the possession of the plaintiff as he lawfully might for the cause aforesaid, which is the same conversion and disposition in the declaration mentioned. Demurrer: assigning for causes that the plea, in effect, amounts to a denial of the right of property of the plaintiff in the goods and chattels in the declaration mentioned, and ought to have been so pleaded in form, and to have concluded to the country; that the statement in the said plea, respecting the conversion of the said goods and chattels, cannot be put in issue by the plaintiff; that the facts disclosed by the plea are not inconsistent with the right of property in the said goods and chattels, being in the plaintiff at the time of the conversion thereof, as stated in the plea;

To trover for trees; defendant pleaded that he was seised in fee of a close, and that he cut the trees growing thereon, and delivered them to R. R. to be kept for him; that R. R. delivered them to plaintiff, whereupon defendant took them from plaintiff, which was the conversion complained of:—Held good on special demurrer.

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that the said plea does not sufficiently confess and avoid the action.

Barstow, in support of the demurrer.—Since the new rules the plea is clearly bad, as amounting to a denial of the plaintiff's property in the goods and chattels. The defendant might have taken issue upon the matter of fact alleged in the declaration; that the plaintiff was possessed as of his own property [*Alderson*, B.—This plea is a denial by bringing the matter to a nicer point]; in order to go to trial, the plaintiff must have taken issue upon the seisin in fee.

Lord ABINGER, C. B.—The object of the new rules was, that the opposite party might be distinctly informed of the defence intended to be set up.

PARKE, B.—There is no doubt this is a good plea since the new rules.

Manning was to have argued in support of the plea.

Leave to amend on payment of costs.

WILLIAMS v. PIGGOTT.

The Court will dispense with strict personal service, where it appears the process has come to the possession of the defendant.

MANSEL moved for a rule to shew cause why the appearance entered for the defendant under the statute, the notice of declaration, and subsequent proceedings, should not be set aside for irregularity. It appeared, from affidavits, that the clerk of the plaintiff's attorney repeatedly called at the defendant's residence, for the purpose of serving him with a copy of the process, but that on such occasions he could not gain admittance, and was

informed by a servant, through a wicket gate, that the defendant was not at home. On a subsequent day, however, he delivered to the servant at the wicket gate a copy of the writ of summons, inclosed in a letter; and, requesting her to give it to the defendant, said he would wait for an answer. He continued to wait for some time, and no one returning, he rang the bell, when a man came and said there was no one at home. The clerk then requested the man to bring back the letter, which he objected to do. The affidavit further stated, that deponent believed defendant was then in the house, and had opened the letter containing the copy of the writ.

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Erle shewed cause, and contended that it was clear the process had come to the hands of the defendant, and in such cases strict personal service had in several instances been dispensed with. *Rhodes v. Innes* (a), *Phillips v. Entell* (b).

Mansel, in support of the rule.—The 12 Geo. 1, c. 29, s. 1, enables a plaintiff to enter an appearance for a defendant only on affidavit of *personal* service. In cases where such service cannot be effected, the proper course is to apply for a *distringas*. *Redpath v. Williams* (c) decided that the sending of process by the post is not good service. In *Digby v. Thompson* (d), it was held, that no difficulty in effecting personal service would dispense with it. And in *Thomson v. Pheny, Patteson, J.*, states it to be the opinion of all the other Judges, that there ought to be an affidavit of *personal* service, in order to entitle the plaintiff to file common bail.

LORD ABINGER, C. B.—Had it not been for the deci-

(a) Ante, Vol. 1, p. 215.

(b) Ante, Vol. 2, p. 684.

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(c) 11 Moore, 333.

(d) Ante, Vol. 1, p. 313.

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sions referred to, we should have thought this case entitled to further consideration. It is true the act requires a personal service, but what shall be deemed personal service the Act of Parliament has not specifically defined. Suppose the defendant, in answer to a letter, acknowledged the receipt of the writ. Strictly speaking, that would not be personal service. So, if the party serving throws the writ upon the floor, and sees the defendant pick it up, that in one sense is not personal service; but who can doubt it is sufficient to satisfy all the statute requires? Here the plaintiff makes a circumstantial affidavit, from which it may be fairly inferred that the defendant received the process, and she does not venture to deny that she had not full knowledge of it. I concur in the decision of *Rhodes v. Innes*, and therefore think this rule ought to be discharged.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged with costs.

LEVI v. CLAGGETT.

Where a defendant was beyond the seas at the time the writ of *exigi facias* issued, the Court reversed the outlawry on payment of costs, and putting in bail in the alternative, according to the practice in the Common Pleas.

HUMFREY shewed cause against a rule obtained by *Jervis*, for reversing the proceedings to outlawry against the defendant. The objections were, first, that the writ of *capias* was delivered to the sheriff, with directions to return it non est inventus; secondly, that the defendant was beyond the seas at the time the writ of *exigi facias* issued. With respect to the first point, he submitted that it was the ordinary practice in proceedings to outlawry to get the sheriff to return non est inventus. On the other point, he shewed cause on an affidavit of the plaintiff's attorney, which stated that the writ issued on the 28th

of April, and was delivered to the sheriff on the 29th ; on which latter day the defendant went abroad for the purpose of avoiding his creditors.

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The COURT were of opinion that there was sufficient ground for reversing the outlawry, but inquired if there was any authority for so doing *without payment of costs*.

Jervis contended that the sending the writ to the sheriff, with the direction to return non est inventus, was an abuse of the process of the Court. *Pigou v. Drummond* (a). [*Alderson*, B., referred to *Graham v. Henry* (b).] There was a different practice in the King's Bench and Common Pleas, as to the terms upon which the proceedings to outlawry were reversed, but there did not appear to be any rule in this Court. By the 10th section of the Uniformity of Process Act, writs are to be in force for four calendar months from their date, unless the return is sooner ordered by the Court or a Judge. In order to get a return sooner than the four months, such circumstances should be shewn as would be sufficient to obtain a *distringas* on a writ of summons.

As to the second point, it was admitted the authorities were against the defendant.

LORD ABINGER, C. B.—The rule should be absolute to reverse the outlawry upon payment of costs, and putting in bail in the alternative, according to the practice of the Common Pleas.

Rule accordingly.

(a) 1 Scott, 264 ; 1 Bing. N. C. 154.

(b) 1 B. & Ald. 151.

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OWEN v. WALTERS.

In an action by the drawer against the acceptor of a bill of exchange, the declaration, after setting out the bill, which was payable at four months, stated, *which period has now elapsed*:—Held sufficient, on demurrer.

It is not necessary to shew on the face of a declaration, that the cause of action accrued before the writ issued.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange. The declaration, which was dated the 25th of October, A. D. 1835, was according to the form prescribed by the rule of Trinity Term, 1 Will. 4 (a), and stated that the plaintiff, on the 29th day of March, 1836, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff 50*l.* four months after the date thereof, *which period has now elapsed*, and the defendant then accepted the said bill, &c. To this declaration the defendant demurred specially, and assigned for cause, that as the words “now elapsed” referred to the time of declaring, and not to the commencement of the suit, it did not appear that the bill was due at the time the action was brought.

Chadwick Jones, in support of the demurrer, referred to *Abbott v. Arlett* (b).

Addison, in support of the declaration.—The case cited is only an authority to shew that this cause of demurrer is not frivolous. The declaration pursues the form given by the rule of Court. [*Parke*, B.—Those forms were only given by way of example. *Alderson*, B.—They were only given to prevent the plaintiff having costs if the declaration exceeded the length of the forms.] It does not appear from the demurrer book on what day the writ issued. [*Parke*, B.—If you take the day in the declaration as descriptive of the date of the writ, there is nothing to shew that the period of four months has elapsed at the commencement of the suit.] That is not

(a) Ante, Vol. 1, p. 108.

(b) Ante, Vol. 4, p. 759; S. C. 1 M. & W. 209.

necessary: it is sufficient if it does not appear upon the face of the declaration, that the cause of action had not accrued at the commencement of the suit. The declaration is intitled the 25th of October, 1835, and the bill is stated to be drawn on the 29th of March, 1836, so that it clearly appears upon the face of the declaration, that the action is not brought too soon. The question is, whether the declaration should contain an express averment, that the bill became due before the action was commenced. [*Abinger*, C. B.—The writ is now the commencement of the action: it only appears from the demurrer book when the declaration was delivered, but not when the writ was sued out. *Parke*, B.—I never drew a declaration against the acceptor of a bill of exchange, in which I did not state, that the bill was due before the commencement of the action.] In a count for goods sold, it is never stated that the goods were sold before the commencement of the suit. In an action on a bond, it is not usual to state that the defendant, before the commencement of the suit, made his writing obligatory. So upon a contract to perform any thing within a reasonable time, the only averment made use of is, that a reasonable time has long since elapsed. Unless the contrary appears, the Court will suppose that the cause of action existed before the action was commenced. *Lee v. Clark* (a). [*Parke*, B.—In the absence of any proof, how are we to assume the date of the writ is the date of the declaration?] The bill would prima facie be taken to bear date on the day on which it was made. *Hunt v. Massey* (b), *Hague v. French* (c).

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Chadwick Jones, in reply, contended, that if the date of the writ appeared, it would make no difference, since it ought to be shewn on the face of the declaration, that the

(a) 2 East, 338. (b) 5 B. & Adol 902. (c) 3 B. & P. 373.

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plaintiff had a cause of action at the time the suit was commenced.

Cur. ad. vult.

LORD ABINGER, C. B. now delivered the judgment of the Court.—The first question in this case was, whether it sufficiently appeared upon the face of the declaration, that the bill was due before the time when the action was commenced. We have looked into the authorities, and think that Mr. *Addison* is correct, and that it is not essential that it should appear upon the face of the declaration that the right of action accrued at any time prior to the commencement of the suit; or, in other words, the Court does not look out of the declaration to see when the action was commenced. Look at the form of pleading the Statute of Limitations; the defendant refers to the causes of action in the declaration, and if the plaintiff wishes to shew a commencement of the suit earlier, he replies that fact. If indeed it appeared on the face of the record that the action was commenced too soon, there would undoubtedly be good cause for demurrer, but we are not to intend that, for the purpose of making the declaration bad. There was another question as to whether the Court would suppose the bill to bear date at the time it was made. It is competent for the defendant to shew the truth by plea, that the bill bears date on a different day from that on which it is stated to be made; but in the absence of such a plea, the Court will not draw any inference, and so long as it is without explanation, it may be fairly supposed that the bill bears date at the time it is stated to be made. It appears, therefore, to us that the declaration is good.

Judgment for the plaintiff.

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LEWIS v. KER.

CHADWICK JONES moved for a rule to shew cause why the plea of the defendant should not be set aside. The action was brought by the plaintiff as indorsee against the defendant as drawer of a bill of exchange for 350*l*. Many ineffectual attempts had been made to serve the defendant with a copy of the process, and at length a rule for a *distringas* was granted. The defendant's attorney then told the plaintiff's attorney that he would enter an appearance for the defendant, which was accordingly done, and he accepted a declaration. The defendant then pleaded he was an attorney of the Court of King's Bench, and not an attorney of this Court. It was submitted, that, since the Uniformity of Process Act (*a*), this was a bad plea, and it was sworn in the plaintiff's affidavit the defendant had admitted the plea was only for delay.

Where, to an action on a bill of exchange, the defendant pleaded that he was not an attorney of the court in which the action was brought; the Court refused to set the plea aside, though it was sworn the defendant had admitted it was pleaded for delay.

PARKE, B.—If the plea is bad, you should demur. The only ground upon which the Court can interfere, as required, is, where the plaintiff has estopped himself from pleading such a plea, which does not appear from the affidavit to be the case.

Rule refused.

(*a*) 2 Will. 4, c. 39, s. 1. See Dowling's Statutes, Vol. 3, p. 138. By this section it is provided, that the writ of summons shall be used, "whether the action be brought by or against any per-

son entitled to the privilege of Peerage or Parliament, or of the Court wherein such action shall be brought, or of any other Court, or to any other privileges, or by or against any other person."

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HORN v. WHITCOMBE.

The render of the principal and notice thereof by bail, does not operate as a stay of proceedings, under R.T.T. 3 Will. 4, unless the costs of writ and service thereof are paid.

THIS was an action of debt upon a recognizance of bail. One of the bail had been served with a copy of the writ of summons, and alias and pluries writs had issued against the other bail, who was served on the 22nd of October last. On the 2nd of November the bail gave notice of the render of their principal, and called on the plaintiff's attorney to know the amount of costs. The costs not having been paid on the last day for rendering the principal, the plaintiff continued the proceedings against the bail. On the 10th of November a summons was taken out before a learned Judge at chambers to stay proceedings upon payment of the costs of the summons only. The learned Judge conceiving that the plaintiff was irregular in proceeding after a render had been duly made, and a notice given, made an order to stay proceeding upon payment of the costs of the summons only.

Petersdorff now moved to rescind the order of the learned Judge.—The rule of Trinity Term, 3 Will. 4 (a), orders, "That, where the plaintiff proceeds by action of debt on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made, and notice thereof given, the proceeding shall be stayed, upon payment of the costs of the writ and service thereof only." In the present case, those costs not having been paid, the plaintiff could only recover them by proceeding with the action, and he consequently incurred further costs after the expiration of the fourteen days.

(a) Ante, Vol. 2, p. 396.

PARKE, B.—The render itself was no stay of proceedings; and the plaintiff was compelled to go on with the action to recover his costs. You may take a rule.

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Rule nisi.

HAYTER v. MOAT.

IN this case judgment had been arrested on the seventh count (a). In the evening of the same day on which the judgment was arrested, and before the rule could be drawn up, the plaintiff's attorney issued a writ of summons for the recovery of the same claim, and served a copy on the defendant's attorney at his office.

Crowder having obtained a rule to shew cause why this writ should not be set aside, with costs, upon the defendant paying the sum sought to be recovered,

R. Gurney shewed cause upon an affidavit, which stated that the rule for arresting the judgment was made absolute before one o'clock; that at half past seven o'clock in the evening deponent served the managing clerk of the defendant's attorney with a copy of the writ of summons, and enquired whether an undertaking would be given to appear to the writ, and was informed in answer, that if he would leave the writ, an undertaking would be given the following morning. *Gurney* contended, that, as the defendant had availed himself of a technical objection in arresting the judgment, the Court should leave him to his ordinary remedy to plead the writ in abatement.

Where judgment was arrested on account of a defect in the declaration, and the plaintiff's attorney, on the evening of the same day, served the defendant's attorney with a copy of a writ of summons for the same claim on which the judgment was arrested, the Court made a rule absolute for setting aside the writ with costs, on payment of the money due within four-and-twenty hours.

PARKE, B.—The record could not be made up until the costs were taxed; and until final judgment the case

(a) See p. 298.

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is still depending. The rule must be absolute, on payment of the money due within four-and-twenty hours.

Rule accordingly.

READ v. SPEER.

A plea of plene administravit does not require counsel's signature.

A party who shews cause in the first instance, is not entitled to costs.

MANSEL moved to set aside an interlocutory judgment for irregularity. A plea of plene administravit had been delivered by the defendant, without being signed by counsel, and the plaintiff had thereupon treated it as a nullity, and signed judgment. In Tidd's Practice (a), it is stated that, in the King's Bench, the plea of plene administravit does not require counsel's signature; and as the practice of this Court was formerly similar to that of the King's Bench, it is presumed it would not require it here.

Sewell shewed cause in the first instance.—By the first rule of H. T. 2 Will. 4, 107 (b), it is declared “not to be necessary that any pleadings, which conclude to the country, be signed by counsel;” from which it may naturally be inferred, that pleas which conclude with a verification like the present, require counsel's signature. In a late case of *Macher v. Billing* (c), it was held, that a plea of the Statute of Limitations requires to be signed by counsel.

PARKE, B.—The plea of plene administravit was always considered in the King's Bench as a common plea, but a plea of the Statute of Limitations was not.

LORD ABINGER, C. B.—The Master informs us that this plea does not require counsel's signature.

Sewell submitted that the rule should be absolute on payment of costs.

(a) Vol. 1, p. 671.

(b) Ante, Vol. 1, p. 197.

(c) Ante, Vol. 3, p. 246.

PARKE, B.—As you show cause in the first instance, you are not entitled to costs. The rule must be absolute without costs.

Rule accordingly.

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FOUNTAIN v. STEELE.

CROMPTON having obtained a rule, calling on the plaintiff to give security for costs, he being out of the jurisdiction of the Court—

It is not necessary to make a demand previously to moving for security for costs, unless it is intended to be part of the rule, that proceedings be stayed in the mean time.

Wightman shewed cause, and objected that it did not appear that any demand for security for costs had been made on the plaintiff's attorney. He cited *Bass v. Clive* (a).

PARKE, B.—It is only necessary to make a demand, where it is also a part of the rule, that proceedings be stayed in the mean time.

Rule absolute (b).

(a) 3 M. & S. 283.

(b) *Jones v. Jones*, ante, Vol. 1, p. 313.

GRIFFIN v. GRAY.

PETERSDORFF shewed cause against a rule obtained by *Chadwick Jones*, for setting aside the writ of summons issued in this cause, the declaration, and subsequent proceedings. The rule had been obtained upon an affidavit, which stated, that the name of the defendant in the writ of summons was *Thomas Gray*, but that the party served with the writ was not *Thomas Gray*, but *William Gray*. It was submitted, that the Court would not interfere, since, if *William Gray* was not the party intended to be sued, the plaintiff could not recover against him.

Where a writ of summons issued against *Thomas Gray*, and was served on *William Gray*, the Court refused to set aside the proceedings.

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PARKE, B.—There is no ground for this application. The plaintiff must prove at the trial that William Gray is the party intended. It seems to me very probable, the right person has been served, though by a wrong name in the writ.

Rule discharged with costs.

HAMLEY v. HUTTON.

A suggestion may be entered on the roll to deprive the plaintiff of costs under the West Brixton Court of Requests Act, (46 Geo. 3, c. 88), when the debt is below 5*l.*; and it is not necessary that the plaintiff should be resident within the jurisdiction.

GALE obtained a rule to enter a suggestion on the roll to deprive the plaintiff of costs under the 46 Geo. 3, c. 88, which is entitled “An Act to explain, amend, and extend the powers of the 31 Geo. 2, c. 23, establishing a Court of Requests for the recovery of small debts within the Western Division of the Hundred of Brixton, in the County of Surrey.” A verdict had been obtained by the plaintiff under a writ of trial, for 3*l.* 19*s.* 5*d.*, before the sheriff of Middlesex; and it appeared from the affidavits, that, when the debt for the recovery of which the action was brought had been contracted, the plaintiff and defendant both resided in the county of Middlesex, but that, subsequently, and before the commencement of the action, the defendant had removed into Surrey, and was residing within the western division of the hundred of Brixton.

Bayley shewed cause against the rule.—There are two questions for the Court to decide—first, whether under the circumstances of this case, the parties came within the provisions of the statute? and secondly, whether the defendant was not bound to plead his liability in bar of the action, instead of taking advantage of it after verdict upon a motion to enter a suggestion on the roll? As to the second question, it is undoubtedly provided by the 14th section of the 46 Geo. 3, c. 88, that, where a

verdict is obtained in any other Court for a debt recoverable in the Court of Requests, the plaintiff shall not be entitled to costs (a); but all the provisions of the 31 Geo. 2, c. 23, are extended to the 46 Geo. 3, c. 88 (b), and the 9th section of the 31 Geo. 2, c. 23, expressly enacts, that, if an action be brought in any other Court for a debt recoverable in the Court of Requests, "the defendant may plead generally in bar of the action, that at the time of commencing such action he was liable to be summoned before the Court of Requests (c)."

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(a) 46 Geo. 3, c. 88, s. 14. And be it further enacted, that if any action or suit shall be commenced in any of his Majesty's Courts of Record at Westminster, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited act and of this act, or either of them, in the said Court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, otherwise have or be entitled to any costs whatsoever, and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to have been recovered in the said Court of Requests, then and so often such defendant or defendants shall have double costs, and shall have such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in any cases by law.

(b) 46 Geo. 3, c. 88, s. 24.

Provided always, that the said hereinbefore recited act of the thirty-first year of the reign of his said late Majesty King George the Second, and all powers, provisions, clauses, matters, and things therein respectively contained, shall, so far as the same are not hereby expressly repealed or otherwise provided for, and are not inconsistent with any of the provisions of this present act, continue and be in full force, and extend to all and every person and persons to whom this act doth or shall extend.

(c) 31 Geo. 2, c. 23, s. 9. And be it further enacted, by the authority aforesaid, that if any action of debt, or upon the case, upon any assumpsit for recovery of any debt to be sued or prosecuted against any person or persons liable to be summoned as aforesaid in any of the King's Courts at Westminster, or elsewhere out of the said Court of Requests, the plaintiff shall declare for any sum of money not amounting to the sum of forty shillings, the defendant may plead

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PARKE, B.—That clause has been repealed by implication. The remedy now is by entering a suggestion on the roll.

Bagley.—Then, as to the first question. Both the plaintiff and defendant must reside within the jurisdiction. The preamble to the act 31 Geo. 2, c. 23, declares that, "Whereas many small debts are daily contracted within the western division of the hundred of Brixton," from which it is clearly to be inferred, that the object of the legislature was only to provide for the recovery of small debts actually contracted within that district. It is

generally in bar of such action that at the time of commencing such action the defendant was liable to be warned or summoned before the said Court of Requests, without pleading any other matter specially; and in case the plaintiff in any such action shall declare for the sum of forty shillings, or any sum of money exceeding the sum of forty shillings, the defendant may plead generally, over and above such matters as aforesaid, that the defendant was not at the time of commencing such action indebted to the said plaintiff in any sum or sums of money amounting to the sum of forty shillings, without pleading any other matter specially, whereto the plaintiff may and shall reply generally, and deny the matters pleaded as aforesaid; and if the plaintiff be nonsuited, or discontinue his action, or verdict pass against him, or judgment be given on demurrer, the defendant shall have full costs; and in case such defendant or

defendants should neglect to plead such matters specially to such action, and shall plead the general issue or any other special matter not hereinbefore particularly mentioned, and the jury upon the trial of such action shall by their verdict find the debt, damages, or sum of money due to the plaintiff to be under the sum of forty shillings, such verdict shall be, and is hereby declared to be void to all intents and purposes, and it shall and may be lawful to and for the Court in which such action shall be depending to tax and award the defendant or defendants in such action his, her, or their full costs of suit, in the same manner as if a verdict had passed for the defendant or defendants in such action; and the defendant or defendants shall in such case have the same or the like remedy for obtaining and recovering such costs as in cases where the verdict passes for the defendant in the like action.

true that the subsequent act (a) provides that "it shall be lawful for any person, whether residing within the

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(a) 46 Geo. 3, c. 88, s. 9. And be it further enacted, that it shall and may be lawful for any person or persons, whether residing within the said western division of the hundred of Brixton or elsewhere, all bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, who now have or hereafter shall have any such debt as hereinbefore specified or mentioned, or any other debt or debts owing or due to, or claimed or demanded by such person or persons, bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, in his, her, or their own right, or in the right of any other person or persons to whom he, she, or they shall be executor, administrator, guardian, or trustee, and for which debt or debts he, she, or they shall demand any sum of money not exceeding the sum of 5*l*. from any person or persons whomsoever, residing or inhabiting within the said western division of the hundred of Brixton, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the said western division of the hundred of Brixton, to cause such debtor or debtors, person or persons, from whom such debt or debts shall be due or owing, or claimed or demanded, and so resident, inhabiting, or keeping any house,

warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing as aforesaid, to be warned or summoned by personal service, or by a printed or written summons left at the dwelling-house, lodgings, or place of abode, warehouse, shop, shed, stall, stand, or any other place of dealing of such debtor or debtors, or person or persons as aforesaid, within the jurisdiction of the said Court, to appear before the commissioners of the said Court at such time and place or times and places, in such and the same manner, and under and subject to such and the same powers, process, and method of proceeding, orders, judgments, decrees, and executions as are mentioned, expressed, enacted, and declared in and by the said recited act of the thirty-first year of the reign of his said late Majesty King George the Second, and that as fully and effectually to all intents and purposes as if the same were herein repeated and re-enacted; and that the said commissioners shall and may, in or by such their orders, decrees, and judgments, order and direct the payment of any such debts to be made, either in one sum at once, or by instalments at stated periods, as they shall see cause and deem just and reasonable; all which order or orders, decrees, judgments, and proceedings so to be made, shall be registered in a book or books as

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western division of the hundred of Brixton, or elsewhere," to sue &c.; but this section must receive a limited construction, to render it consonant with the other provisions of the statute. *Webb v. Brown* (a) determined that an act (b), which was the same in effect, though not containing precisely the same words, only applied to cases where both parties resided within the jurisdiction of the London Court of Requests; and *Dillamore v. Capon* (c) was decided, after argument and deliberation, upon words precisely similar in an act regulating the Court of Requests for the other division of the hundred of Brixton (d). [*Alderson, B.*—In that case, the Court of Common Pleas decided that the word *elsewhere* referred to the parishes recited in the former act, and which were not within the eastern division of the hundred of Brixton. What construction should be put upon the word *elsewhere* in this statute?] "Elsewhere" may be read—"elsewhere within the jurisdiction." [*Alderson, B.*—The jurisdiction is confined to the western division of the hundred of Brixton, and the words of the act are, "Any persons residing within the said western division of the hundred of Brixton or elsewhere." Unless we hold that plaintiffs residing out of the jurisdiction are entitled to sue, the word "elsewhere" would be absurd.] There may have been a doubt as to what was comprehended within the western division of the hundred of Brixton. At all events,

they have been accustomed to be, which registry shall be made by the said clerk, or his sufficient deputy, and as well the party plaintiff or parties plaintiffs, as the debtor or defendant, debtors or defendants whom such order or orders, decrees, judgments, and proceedings shall respectively concern, shall observe, perform, and keep the same respectively

in all points; and no such orders, decrees, judgments, or proceedings shall be removed or removable into any other Court by certiorari, or otherwise howsoever.

(a) 5 T. R. 535.

(b) 14 Geo. 2, c. 10.

(c) 1 Bing. 388; 8 Moore, 429, S. C.

(d) 46 Geo. 3, c. 87.

by giving such a construction to the act as is now contended for by the defendant, the clause which enables the commissioners to award a defendant damages and costs of suit for vexatious prosecutions (a) must be wholly inoperative, when the plaintiff resides beyond the jurisdiction; as the commissioners can only enforce their decrees within the western division of the hundred of Brixton (b).

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(a) 31 Geo. 2, c. 23, s. 27. And be it further enacted, by the authority aforesaid, that if any plaintiff or plaintiffs shall summon or cause to be summoned any defendant or defendants to appear before the said Court, under pretence of any debt owing to him, her, or them, from such defendant or defendants, and shall not appear and prosecute such suit or suits, or shall not prove to the satisfaction of the said commissioners or any three or more of them, that there was a probable cause of suit or complaint against such defendant or defendants, then and in such or in either of these cases it shall and may be lawful to and for the said commissioners, or any three or more of them, and they are hereby authorized, empowered, and required to give judgment of nonsuit against such plaintiff or plaintiffs, and to award and order him, her, or them to pay the costs of such suit or suits; and if the said commissioners, or any three or more of them, shall be of opinion that such or either of the said prosecution or prosecutions was or were vexatious, that then and in such case it shall and may be lawful to and for the said commissioners, or any three or more of them, to award and or-

der such plaintiff or plaintiffs to pay to such defendant or defendants such damages for such vexatious prosecution as they shall think reasonable, over and besides the costs of suit, on judgment of nonsuit aforesaid, not exceeding the sum of ten shillings; and in case such plaintiff or plaintiffs, after being served with an order for payment of such costs only, or such costs and damages jointly, as shall be so respectively awarded against him, her, or them, shall refuse or neglect to pay the same, then and in such and in either of the said cases it shall and may be lawful to and for the said commissioners, or any three or more of them, and they are hereby authorized, empowered, and required to issue out of the said court process of execution against the goods and chattels or body or bodies of every such plaintiff or plaintiffs, for levying such damages or costs by distress and sale, or for compelling by imprisonment the payment thereof, in such and the like manner as execution against the goods and chattels or body or bodies of any defendant or defendants by virtue of this act may be awarded and issued forth.

(b) 31 Geo. 2, c. 23, s. 4. And be it further enacted, by the au-

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PARKE, B.—We think there is no doubt in this case. It is enough if the defendant was resident within the jurisdiction of the Court of Requests when the action commenced, and it is admitted that he was so resident.

Rule absolute.

thority aforesaid, that upon making and pronouncing every such final order, judgment, or decree, as the said commissioners or any three or more of them shall make and set down for or concerning or relating to such debt or debts, complaint or complaints, and costs of suit for or against such plaintiff or plaintiffs, defendant or defendants as aforesaid, then it shall and may be lawful to and for the said commissioners, or any three or more of them, to award and issue out, or cause to be issued out of the said Court, process of execution against the body or goods of such person or persons, directed to the beadle or officer appointed to execute the process of the said Court for the time being, for levying by distress and sale of such goods, or for the compelling by imprisonment as hereinafter is mentioned, the payment of such sum or sums of money as shall be ordered, adjudged, and decreed to be paid by any such order, judgment, or decree as aforesaid, which executions against the body or goods shall be governed by and subject to the same rules as executions by the writ *fieri facias* and *capias ad satisfaciendum* out of superior Courts are subject to; and upon

and by virtue of every such execution, so to issue out of the said Court of Requests against the body or bodies of any debtor or debtors, the party or parties against whom the same shall issue shall and may, if he, she, or they be found within the said western division of the hundred of Brixton, be taken and committed to, or detained in custody or safe keeping of the beadle of the said Court for the time being, to be by him or them committed to and confined in the county gaol of the county of Surrey, the gaoler or keeper of which said gaol is hereby required to receive such person or persons from such beadle, and to keep such person or persons within the said gaol during the time for which he, she, or they shall be committed by virtue of such execution, there to remain in confinement until he, she, or they shall perform and obey such order, judgment, and decree as aforesaid, so as no person so to be imprisoned shall remain in actual confinement and custody, under the said execution, for a longer space of time than forty days, to be computed from the day of such commitment exclusive.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

WILSON and ESTHER his Wife v. LAINSON and Another.

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TRESPASS, for assault and battery, and for false imprisonment upon the female plaintiff. Defendants pleaded, first, Not guilty—secondly, that plaintiff Esther was not the wife of plaintiff William Wilson—thirdly, as to assault and imprisonment, a justification under process. The cause was tried before Mr. Justice *Bosanquet*, at the London Sittings after Trinity Term, 1836; and the jury found a verdict for the plaintiffs, which was entered for them on the postea, upon all the issues, with one farthing damages upon each. Mr. Justice *Bosanquet* certified in the common form, under the 43 Eliz. c. 6, to deprive the plaintiff of his costs. In this term, a rule was obtained by *Martin*, for the defendants to shew cause “ why the said certificate should not be discharged, and why it should not be referred to one of the Prothonotaries of the Court to tax the plaintiffs their full costs of the action,” upon the ground that the statute of Elizabeth gave no authority to the Judge to certify in cases of battery (a), and that the plaintiff was not

Trespass at the suit of husband and wife, the declaration charging assault, battery, and false imprisonment, 1st plea, Not guilty, the jury finding a farthing damages for the plaintiff, the Judge certified under the 43 Eliz. c. 6. s. 2:—the Court would not set aside the certificate, although the verdict had been entered generally for the plaintiff on that issue on the postea. Held, also, that the defendant having, in another plea, traversed the marriage of the female plain-

tiff with the male plaintiff, he had not admitted the battery on the record, and therefore the Judge had jurisdiction to certify.

(a) Stat. 43 Eliz. c. 6, s. 2. And be it further enacted, “ if upon any action personal, to be brought in any of her Majesty’s Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to

the judges for the same Court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of 40s. or above, that in every such case the judges and justices before whom

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deprived of his costs under stat. 22 & 23 Car. 2, c. 9, sec. 136 (a), the battery in this case being conclusively found and admitted—first, by the verdict of the jury upon the first plea—secondly, by the admission of such battery on the second plea. The cases which he chiefly relied upon were *Bone v. Dawe* (b), *Hughes v. Hughes* (c), and *Smith v. Edwards* (d), and distinguished the present case from that of *Wiffin v. Kincard* (e), and also of *Briggs v. Bowgin* (f), from the circumstance of there being no other pleas in those cases than Not guilty.

Talfourd, Serjeant, and *Ball*, now shewed cause, and contended, as to the first point, that if the verdict of the jury upon the plea of Not guilty precluded the Judge from certifying, no certificate could ever be granted; and as to the second point, that the admission of the battery

any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

(a) Stat. 22 & 23 Car. 2. c. 9, s. 136, enacts as follows:—"And for prevention of trivial and vexatious suits in law, whereby many good subjects of this realm have been and are daily undone, contrary to the intention of an act made in the three-and-fortieth year of queen Elizabeth, for avoiding of infinite numbers of small and trifling suits commenced in the Courts at Westminster; be it further enacted, for making the said law effectual, that from and after the first of May aforesaid, in all actions of trespass, assault

and battery, and other personal actions, wherein the Judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40s., shall not recover or obtain more costs of suit than the damages so found shall amount unto."

(b) 3 Ad. & E. 711.

(c) 2 C. M. & R. 663.

(d) Ante, Vol. 4. p. 621.

(e) 2 N. R. 471.

(f) 2 Bing. 333.

on the record ought to have been by plea of justification concluding with a verification, to have the effect of making the Judge's certificate inoperative, and cited the cases of *Wiffin v. Kincard* (a), *Emmett v. Lyne* (b), *Smith v. Edge* (c), *Brennan v. Redmond* (d), *Page v. Creed* (e).

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They also cited Hullock's Law of Costs, p. 23, where it is said, "that if in an action for an assault, battery, and false imprisonment, the plaintiff obtain a verdict for less than 40s. damages, the Judge may certify, under 43 Eliz. c. 6, that the damage did not amount to 40s., by which certificate the plaintiff will be deprived of full costs, although a battery were proved at the trial, unless indeed, in the case of an actual battery, there should be a certificate under the 22 & 23 Car. 2. c. 9; for whether there be evidence of a battery or not, it would not prevent the Judge from certifying with respect to the imprisonment under the 43d of Eliz., and the plaintiff is not entitled to full costs for the assault and battery without a certificate under the 22 & 23 Car. 2, c. 9." The case of *Smith v. Edwards* (f) is conclusive to shew, that since the new rules and pleading, the plea of Not guilty takes the case out of the statute of Charles, and that the Judge may grant his certificate notwithstanding, to deprive the plaintiff of his costs.

Martin, in support of the rule, contended that the certificate could never be contradictory to the record, and that the proper course, when a Judge certifies, was that a verdict should be entered upon the postea of Not guilty as to the battery, and Guilty as to the assault and imprisonment; and that, upon the present rule, the postea was con-

(a) 2 N. R. 471.

(b) 1 N. R. 255.

(c) 6 T. R. 562.

(d) 1 Taunt. 16.

(e) 3 T. R. 391.

(f) Ante, Vol. 4, p. 621.

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elusive ; and on the second point, he contended that the judgment of Lord Kenyon in *Smith v. Edge* proceeded entirely upon the conclusion of law, that a battery was admitted upon the record, and that the expression of plea in justification was merely used by him, because at that time there were no pleas concluding to the country, which admitted any of the facts averred in the declaration, but that now, since the new rules of pleading, there were such pleas ; and that the plea denying the marriage in this case was one of them ; and that the true test here was, supposing this to have been the only plea, would not the plaintiffs have been entitled to nominal damages for the battery without giving any proof of it. This, he contended, they would, and he relied upon *Hughes v. Hughes* and *Smith v. Edwards* as conclusive in his favour.

Cur. adv. vult.

TINDAL, C. J.—The question in this case is, whether, notwithstanding the Judge's certificate under the stat. 43 of Elizabeth, the plaintiff is entitled to his full costs ; and this depends on another question, whether a battery appears to be confessed upon the record ; as actions for battery are expressly excepted out of the statute ; if it appears judicially to us that this was an action for battery, the statute does not apply. The plaintiff contends that such an admission appears on the record, upon two grounds : First, because on the issue joined on the plea of Not guilty, the *postea* had been entered up generally for him ; and he insists, that as he has declared for a battery, and there is no exception of it in the finding of the jury, it must be taken, as against the defendants, that a battery was proved at the trial. But to this, the answer appears obvious, that the question as to the evidence must be considered now, as it was at the time the certificate was given, and at that time there had been no *postea* formally drawn up ; and if the facts were such as that the Judge

had the power to certify at the moment the cause was decided, the defendants cannot be deprived of the benefit of such certificate, by the subsequent voluntary act of the plaintiff himself. The other ground on which the plaintiff relies is, that the second plea, taking issue only on a single fact alleged in the declaration, must be taken to be an admission of the battery. But we think, taking the whole of the record together, there is no necessary confession of the battery on this record. The plea of Not guilty expressly denies it; the last plea, which is a plea in confession and avoidance, excludes the battery. The question, therefore, arises on the second plea alone. Now this is not in its form a plea of confession and avoidance; it is a plea of traverse or denial of a particular collateral fact alleged in the declaration; and if this plea had been pleaded alone, although the plaintiff might contend that a cause of action was admitted by the defendant, yet he never could have contended, that the whole of his ground of action was admitted; for his cause of action in this case is several and divisible. His action is maintainable either for the assault or the battery, or the imprisonment; either of those grounds of action would support it. The admission, therefore, of a ground of action which is divisible, we consider no necessary admission of the whole, but that the plaintiff must still prove at the trial what part of his gravamen he relies on.

Holding, therefore, that there is no necessary admission of a battery on this record, we think the certificate of the Judge, under the statute of Eliz., deprived the plaintiff of full costs.

Rule discharged.

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DAVIS v. CURTIS.

A prisoner is entitled to his discharge under the 48 Geo. 3, c. 123, although he refuses to deliver his schedule pursuant to the compulsory clauses of the Lords' Act, after the expiration of his sixty days claimed by him, and which have expired before the end of the twelve months' imprisonment, in respect of which, he claims his discharge.

IN Trinity Term, the defendant, a prisoner, was brought up at the suit of the plaintiff under the compulsory clauses of the Lords' Act, 32 Geo. 2, c. 28, ss. 16, 17. The prisoner claimed the sixty days allowed by the statute, and was thereupon remanded. The sixty days expired in July, and, on the first day of Michaelmas Term—

Andrews, Serjeant, moved for the prisoner's discharge under the 48 Geo. 3, c. 123, he having been in execution more than twelve months for a debt not exceeding 20*l*. The year of imprisonment expired in August.

The ten days' notice required by the rule of Hilary Term, 2 Will. 4, s. 90 (*a*), not having been given, the Court held that the party had not placed himself in a position to be entitled to his discharge.

On the second day of the same term, the prisoner was brought up at the instance of the plaintiff under the Lords' Act.

Andrews, Serjeant, on behalf of the prisoner, contended, that, inasmuch as he would have been entitled to his discharge under the 48 Geo. 3, c. 123, on the preceding day, but for the want of the notice which the practice of the Court required, he could not now be the subject of any compulsory proceeding under the Lords' Act; for that, having suffered the imprisonment mentioned in the former statute, and thereby entitled himself to his discharge,

(*a*) By which it is ordered, that "A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l*., may be made absolute in the first instance, on

an affidavit of notice given ten days before the intended application, which notice may be given before the year expires. Ante, Vol. 1, p. 195.

he must be considered as if actually discharged, especially with reference to proceedings under an act so highly penal as the Lords' Act.

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Mansel, contra.—The defendant having been brought up under the Lords' Act in Trinity Term last, and having claimed the sixty days allowed him by the statute for preparing his schedule, and been remanded, on the expiration of the sixty days (within the twelvemonth) he was in default, and became liable to the penalty imposed by the statute. The notice required by the rule of court not having been given, the prisoner is not in a condition now to apply to the Court for his discharge under the 48 Geo. 3, c. 123. All therefore that the Court has power to do is, to call upon the prisoner to make an assignment of his effects for the benefit of his detaining creditors.

TINDAL, C. J.—In *Langdon v. Rossiter*, M'Clel. 6, 13 Price, 186 (nom. *Ex parte Rossitor*), the Court of Exchequer held, that a person who has lain in prison more than twelve months in execution for damages under 20*l.*, exclusive of costs, is entitled to be discharged out of custody forthwith as to such execution, on an application made under that statute, notwithstanding he had previously been brought up under the compulsory clauses of the Lords' Act, and then refused to deliver in a schedule of his effects, in consequence of which he had been remanded. The words of the 48 Geo. 3, c. 123, are, that "all persons in execution upon any judgment for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his Majesty's superior courts of record at

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Westminster [wherein such judgment shall have been obtained], to the satisfaction of such court, *be forthwith discharged out of custody as to such execution, by the rule or order of such court.*" The rule of court provides, that, to entitle the party to succeed on such an application, ten days' notice shall be previously given to the detaining creditor. In the present case, had the prisoner complied with this rule, we should have pronounced an order for his discharge yesterday. The question therefore is, whether he is not already virtually discharged. Let there be a rule nisi for the prisoner's discharge under the 48 Geo. 3, c. 123, and the matter may be discussed on a future day.

A rule nisi having been granted accordingly (a),

Mansel, on a subsequent day, shewed cause.—In *Langdon v. Rossiter*, the twelve months had expired before the expiration of the sixty days; a circumstance which materially distinguishes it from the present case. The practice, before the late rule, with respect to motions under the 48 Geo. 3, c. 123, is thus stated by Mr. Tidd (Prac. 9th edit. 388)—“ On a motion for the discharge of an insolvent debtor under the above statute, the rule, in the King's Bench, is absolute in the first instance, after due notice of the application has been given to the plaintiff or his attorney (*Davis v. Rogers*, 2 B. & C. 804, 4 D. & R. 361); but, in the Common Pleas, it is in the first instance only a rule nisi”—citing *Ex parte Neilson*, 7 Taunt. 37, and *Magnay v. Gilkes*, 7 Taunt. 467. Here, the prisoner was bound within the time prescribed by the Lords' Act to deliver in upon oath a full account of his estate and effects, and to execute the proper assignment. When brought up on the second day of the term, the course which ought to have been pursued was, for the Court to call upon him

(a) *Moore v. Clay*, ante, Vol. 4, p. 5.

to comply with the statute, by delivering in such account, and making such assignment (a). The circumstance of time having been granted to him by the Court ought not to be permitted to prejudice the plaintiff's right.

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Andrews, Serjeant, in support of his rule.—*Langdon v. Rossiter* is not to be distinguished from the present case. When the prisoner was brought up in Trinity Term, the Court had no power to remand him otherwise than generally; *Langdon v. Rossiter, Ex parte White* (b). The statute 48 Geo. 3, c. 123, is explicit and imperative; and it contains no reservation of the power of the detaining creditors under the 32 Geo. 2, c. 28. The creditor is in no way injured; for, his judgment will remain in force notwithstanding the defendant's discharge, and he may still have execution against his effects.

Cur. adv. vult.

TINDAL, C. J., now said,—Having attentively looked into the acts, and considered the circumstances of this case, we are of opinion that our determination must be the same as it would have been had the defendant placed himself in a situation to call for it on the first day of term. The facts appear to be these:—In Trinity Term last, the defendant was brought up at the suit of the plaintiff under the compulsory clauses of the Lords' Act, claimed his sixty days, and was remanded. The sixty days expired in the month of June. On the first day of the present term, the defendant applied for his discharge under the 48 Geo. 3, c. 123, he having been in execution upon a judgment obtained against him in this Court for a debt not exceeding 20*l.*, and having lain in prison thereupon for the space of twelve successive calendar months. The twelve months were not completed until the month of August. When

(a) *Evan v. James*, ante, Vol. 1, p. 260. (b) Ante, Vol. 1, p. 66.

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the last-mentioned application was made to the Court, the party had failed in pursuing strictly the practice of the Court : no notice of the motion had been given to the detaining creditor, and consequently the prisoner could not then be actually discharged. Qui prior est tempore, potior est jure. The prisoner not having been discharged under the 48 Geo. 3, at the time of the plaintiff's application (on the second day of this term) under the Lords' Act, I think we must call upon the prisoner to deliver in his schedule before we dispose of the other rule. But, inasmuch as, by the 48 Geo. 3, he is declared entitled to his discharge on application to the Court, I do not see that his refusal to deliver a schedule and make an assignment affords any answer to his motion under that statute. If he has been guilty of any offence he is still liable to be indicted.

The prisoner was then asked by the Court if he was prepared to deliver in upon oath a schedule of his estate and effects in the manner required by the statute. He answered in the negative : whereupon the Court ordered the rule for his discharge under the 48 Geo. 3, c. 123, to be made absolute.

Rule absolute.

GALE v. WINKS.

If a Judge at chambers order a distringas to issue, the Court will not afterwards interfere to set the Judge's order aside, although three calls and two

appointments may not have been made ; but the distringas itself will be set aside for not being indorsed with the amount claimed by the plaintiff.

WILDE, Serjt., shewed cause against a rule obtained by *Archbold* for setting aside a writ of distringas and copy thereof, and for rescinding the order of Mr. Justice *Park*, bearing date the 27th October, on which it was issued, for irregularity, and for the return of the money levied on the writ to the defendant or his attorney.

The irregularity alleged in granting the order was, that the person who had attempted to serve the defendant with the writ of summons had only called twice and made one appointment, instead of making the usual number of three calls and two appointments. The irregularity in the writ of distringas was, that it was not indorsed in the manner required by the act, with the amount claimed by the plaintiff.

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Wilde, Serjt., contended that the making the order for the distringas was perfectly regular. The act of parliament required that it should be shewn, to the satisfaction of the Judge at chambers, or of the Court, that due pains had been taken to serve the defendant. It was true that the Court had laid down a rule that there should generally be a certain number of calls and appointments, but it did not appear that that rule must be strictly adhered to in every case, or that the Court thereby intended to preclude themselves, or a Judge at chambers, from exercising their or his discretion. Here, the affidavit, on which the order for the distringas issued, was fully before the Judge, and he had every opportunity of examining the particular circumstances of the case, and of exercising his judgment. The circumstances alleged in the affidavit were, that on the 13th October the clerk to the plaintiff's attorney called at the house in question, with the intention of serving the defendant with the writ of summons; but finding that he was not at home, he wrote a letter to him, explaining the nature of his business, and appointing to call at a quarter before nine o'clock on the evening of the 15th. He did go at the time appointed, and saw the same person whom he had before seen, and who told him that the defendant had received the letter which he had left for him, but was then out, and was expected home either that night or the next morning. The deponent waited for half an hour, but finding that

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the defendant did not return, he wrote a second letter, in which he enclosed a copy of the writ, and stated, that unless some answer were given by a certain day, a distringas would be applied for; and the affidavit concluded by stating that no answer was given, and the deponent believed the defendant kept out of the way to avoid being served. These facts were not now attempted to be denied; and it was not competent for the defendant to come to the Court now, and to call upon them to review the decision of a Judge given in the course of the long vacation; but at all events, if he did so, it was his duty to make out a very strong case. With regard to the second point, the object of the statute, as well as the state of the proceedings, must be taken into consideration.

Archbold, in support of the rule, referred the Court to the 2 Reg. Gen. H. T. 2 Will. 4 (a). It was ordered by that rule that the amount of the debt and costs claimed by the plaintiff from the defendant should be indorsed upon everyailable writ and warrant, and upon the copy of any process served for the payment of any debt, and the form of indorsement was distinctly pointed out. By the 5th rule of M. T. 3 Will. 4 (b), this provision was extended to writs of distringas.

Wilde, Serjt., contended that the distringas issued on the supposed default of the defendant, in appearing to the writ of summons. On the latter writ, there was a proper indorsement; and it was a question, therefore, whether the rule which contained the word "distringas" did not apply to writs of that nature only when they were in the nature of original process, and not after issuing a writ of summons.

Archbold, in support of his rule, contended that, according to the strict rule, three calls and two appoint-

(a) Ante, Vol. 1. p. 198.

(b) Ante, Vol. 1, p. 471.

ments must have been made, before an application could be granted for the issue of a writ of *distringas*. In the Courts of K. B. and Exchequer, this was the invariable rule, and there was no reason why it should be deviated from in this Court; had such an affidavit as that on which the order for the *distringas* was granted been presented before the Court, the writ would never have been permitted to issue; and although no facts were now stated in contradiction to the circumstances alleged in that affidavit, yet the case was so weak, that it could not be entertained. The allegation, that the deponent believed the defendant kept out of the way, was a mere form, and some facts should be specifically stated, from which this could be inferred.

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TINDAL, C. J.—This rule must be absolute, so far as regards the setting aside the *distringas* and copy, and subsequent proceedings, for the irregularity in the indorsement. The Court, however, is not satisfied that the other part of the rule, for setting aside the order of Mr. Justice *Park*, should also be absolute, for the words of the Act of Parliament require that the fact of the attempted service, and the defendant's keeping out of the way, should be made out to the satisfaction of the Judge, and a more efficient remedy may then be given. Here, the question was not, whether the rule laid down to be generally followed was strictly complied with, but whether, *rebus sic stantibus*, there was sufficient to justify the learned Judge in making his order. Mr. Justice *Park* appeared to have been satisfied that more efficient means were proper, to procure the appearance of the defendant, than those which had been already taken; and there were now no facts stated on behalf of the defendant, which called on the Court to review the opinion of the learned Judge. The part of the rule, therefore, which applied to the order must be discharged.

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GASELEE, J.—I am of the same opinion. Mr. *Archbold* must himself admit that there are some cases in which the rule laid down by the Court cannot be followed.

VAUGHAN, J., and BOSANQUET, J., concurred.

The rule was then also made absolute for the return of the money levied to defendant, on his undertaking to appear.

Rule accordingly (a).

(a) See *Hickman v. Dallimore*, ante, vol. 4, p. 278, in which it was held, that where it is clear that the defendant keeps out of the way to avoid being served, the Court will grant a *distringas*, although three calls and two appointments have not been made.

Ex parte GARCIA, a Bankrupt.

Where a prisoner is detained in prison upon several detainers, the Court will not inquire into the validity of a subsequent warrant committing him to another prison, but on which he has not been taken to that other prison.

ATCHERLEY, Serjeant, moved for the discharge of the bankrupt from the custody of the warden of the Fleet. The bankrupt was brought up from that prison by virtue of a writ of habeas corpus; the return to which stated, that Abraham Garcia was detained upon five several writs of detainer, at the suit of five several plaintiffs in different causes; and also that a warrant for his imprisonment had been directed to the keeper of Newgate by J. S. M. Fonblanque, J. H. Merivale, and E. Holroyd, Esqrs., the Commissioners of the subdivisional Court of Bankruptcy. The warrant not having been set forth in the return to the writ, it was now objected that such return was irregular, and that although the warden of the Fleet produced the warrant itself in Court, the return was insufficient, and the prisoner was entitled to his discharge; and as a second ground of objection it was urged, that the bankrupt had sufficiently answered all questions put to him by the Commissioners, and therefore, quoad this com-

mitment, he was entitled to be released from his imprisonment.

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TINDAL, C. J.—How can we discharge the bankrupt, when, according to the return of the warden of the Fleet, he was under five regular detainers?

Atcherley, Serjeant.—The Court can discharge him as to this particular warrant, if they determine upon its invalidity; and for that I am now contending.

TINDAL, C. J.—No; according to the return of the warden, there are only five causes of imprisonment in his custody, and those upon detainers lodged with him; it certainly adds, that a warrant has been addressed to the keeper of Newgate, but the warden does not detain him in custody under the warrant which you contend is bad in substance; and, therefore, when he is in the custody of the keeper of Newgate it will be time enough to make this application. The only course which is left for the Court is, to remand the bankrupt on the detainers which have been lodged against him with the warden of the Fleet.

Motion refused.

BENNETT v. SMITH.

THIS was an application to set aside a judgment for irregularity, on the ground of the rule to plead having been filed before notice of declaration had been served upon the defendant. The facts, which were not disputed, were as follows:—The declaration was filed by the plaintiff, at the proper office, on the 26th October, and a notice of filing sent down to the defendant, who lived at Liverpool, on the same day; on the 28th he wrote to his agent in town, informing him of the

The notice of declaration must be served previously to filing a rule to plead.

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service of the notice, and then searched the file for a rule to plead, and not finding a rule either on the 27th or following days, concluded that none had been filed; on the 12th November judgment was signed for want of a plea, and upon a second search, it was ascertained that the rule to plead had been filed on the 26th October, being on the same day as the declaration had been filed.

Crowder, in shewing cause against the rule, contended that it was sufficient if the rule was filed at the same time as the declaration, and that it was not necessary first to ascertain whether notice of declaration had been served on defendant, which would lead to great inconvenience where the parties lived in the country, and at such a distance as in the present case.

Sewell, in support of the rule.—The declaration is good only from the time of notice; the filing a rule to plead was premature, as the notice could not have reached the defendant. He cited *Archbold's Practice*, where it is clearly laid down that a rule to plead cannot be entered before the declaration is delivered or filed, and notice given, and also the cases of *Weddle v. Brazier* (a), and *Hutchinson v. Brown* (b).

The Court said, they would make inquiries as to the practice of the other Courts.

On a subsequent day, in Term,

The Court said, that full inquiries had been made of the officers in the other Court, and also of the prothonotary, and it appeared to be the universal practice, that the rule to plead cannot be filed until after the notice of declaration has been served. In this case, therefore, the

(a) Ante, Vol. 1, p. 639.

(b) 7 T. R. 298.

rule to plead having been filed on the same day with the declaration, but before service of the notice on the defendant, the subsequent judgment was clearly irregular, and must be set aside.

Rule absolute.

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v.
SMITH.

Ex parte GROVE and Another.

HUMFREY, on a former day, obtained a rule calling upon Mr. Charles Roberts, an attorney of this Court, and one of the perpetual commissioners appointed for taking the acknowledgments of deeds by married women, under the statute 3 & 4 Will. 4, c. 74, to shew cause why he should not deliver up two certificates of acknowledgment of married women taken under the said act; and also certain other deeds and papers relating thereto, and severally acknowledged before himself and his co-commissioner. It appeared from the affidavits on both sides that Mr. Roberts and one W. B. Collis were commissioners acting under and in pursuance of the act for abolishing fines and recoveries, and had taken the acknowledgment of two married women at the request of a Mr. Rogers, the attorney of the parties; that when Mr. Rogers's clerk called upon Mr. Roberts to ascertain whether the affidavits verifying the certificate were made, the latter gentleman said, he could not do so until he had seen the deeds, meaning the deeds which had been acknowledged; and which were brought to him in consequence; when he had made the necessary affidavit, he told the clerk that he could not deliver up the certificates or deeds until he had been paid the fees which he was entitled to for taking such acknowledgments, stating that they amounted to 2*l.*, and sent a notice to Mr. Rogers to that effect, also stating that he would deliver up the papers immediately upon receiving the fees which were due to him. Mr. Rogers

An attorney acting as commissioner under 3 & 4 Will. 4, c. 74, has a lien upon the acknowledgments and deeds which may come into his possession as such commissioner, for his fees in taking the acknowledgment, but not for those of his brother commissioner, unless he can shew a joint authority.

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then sent to Mr. Roberts his fees as demanded, and again applied for the deeds. Mr. Roberts then asked whether Mr. Collis's fees were paid, and being answered in the negative, said that he should not deliver up the papers to Mr. Rogers or his clients until Mr. Collis's fees were also paid. It was then stated, that the deeds were with Mr. Collis.

The case was brought before the Judge at chambers, who considered it of too great importance to be decided there, and referred the parties to the Court.

Whately shewed cause.—This application, if it is sustainable at all, should have been made against Mr. Collis, in whose possession the deeds appear to be. And, secondly, even if Mr. Roberts has the deeds, he is justified in keeping them. The papers came into his hands in his character of an attorney, and the law is abundantly clear to shew, that when muniments of title or papers come into the hands of an attorney or solicitor, he has a lien upon them for his costs or general balance. The commissioners here were acting jointly, and one, being authorized by the other to retain the deeds for his share of fees, was entitled to do so. It is analogous to the officers of the Courts, who have a lien upon papers until their fees are paid.

Humfrey, in support of the rule.—Reference must be had to the facts. Mr. Roberts upon the first application said that he should retain the deeds until his fees were paid, without reference to the claims of his co-commissioner, or without shewing any authority on his behalf; his (Roberts's) lien was therefore exhausted directly his share of the fees was paid. Each commissioner had a right to retain the deeds until his own individual costs were satisfied upon them; but Mr. Roberts wanted to do more, and therefore the rule must be absolute against him.

TINDAL, C. J.—It is perfectly clear that the two gentlemen who were appointed commissioners for taking these acknowledgments had a right to receive their fees, and also to a lien upon the deeds until the fees were paid; but this only applies to them so long as they were acting jointly, and the deeds in their joint possession. Without this right, the commissioners would be without a practicable remedy for the recovery of these small sums. At the time when Mr. Roberts demanded those fees, he might perhaps have a clear right to make a demand for their joint fees, if he had shewn a joint authority; but after demanding his own fees only, without reference to those of his brother commissioner, and having been satisfied as far as he was concerned, he cannot now turn round and say that they are in the hands of his brother commissioner. I therefore think this rule must be made absolute.

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GROVE.

Rule absolute.

STANHOPE v. EAVERY and Another.

THIS was a rule calling on the plaintiff to shew cause why certain monies in the hands of the sheriff of Essex should not be returned to the defendant Eavery. The proceedings in an action of replevin between these parties had been removed from the county court of Essex into this Court. Upon the trial, a verdict had been found for the plaintiff, with the usual damages; and subsequently, an application had been made to set the verdict aside, and to enter one for the defendants, but the rule was discharged. The costs having been taxed, execution issued against the goods of the defendant Eavery, Firman the other defendant having absconded.

The Court refused to compel a sheriff to refund to a defendant monies arising from an execution on his goods, on the ground that the action was defended by an attorney without authority, until it appeared whether such attorney was insolvent or not.

The present application was made on the grounds that

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Mr. Wright, the attorney, had unnecessarily made Eavery a defendant; that the action was defended, without the knowledge or authority of Eavery, who had never communicated with Wright on the subject, and did not hear of any action until the execution issued against his goods. It appeared by the affidavits that a plaint had been served upon Eavery, who made cognizance as bailiff of the other defendant.

Turner now shewed cause, and contended that the Court could not interfere in this manner, by compelling the sheriff to deliver up the levy money. The defendant Eavery must seek his remedy against Wright, and as he was an attorney, and an officer of this Court, he was amenable to its authority, and would be compelled to answer to the defendant for any act of aggression of which he might have been guilty. There is no case in which the Court has interfered in the manner now applied for, except where the attorney has become insolvent, as in *Latuch v. Pasherante* (a). If the attorney takes upon himself to appear, the Court will presume his authority to do so, and leave the other party to his remedy by action. He then cited *Mudry v. Newman and another* (b); *Thomas v. Filmer* (c); *Hewes and others v. Delber* (d); and *Williams v. Smith* (e). In equity, although a solicitor has no authority to commence a suit without a retainer, it is the general practice for him to defend by the general authority he has as a solicitor. [*Tindal*, C. J.—In our Courts there ought to be an authority in writing.] That may be the strict rule of law; it differs, however, from the general and ordinary rule adhered to in practice.

(a) Salk. 86. Anon. ib. Anon.
 ib. 88.

(b) 1 C. M. & R. 402.

(c) 2 C. & M. 519.

(d) 3 Taunt. 486.

(e) Ante, Vol. 1, p. 632.

Wilde, Serjt., in support of the rule.—The service of the plaint upon Eavery sufficiently shews his knowledge of the action pending against him; and when once an attorney acts as an attorney in the cause, the Court will not inquire into the extent of his authority, but proceed as it sees fit for the benefit of the parties.

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TINDAL, C. J.—The Court cannot come to a decision in this matter without being put into possession of facts respecting Mr. Wright's circumstances. In the cases referred to in *Salkeld*, the attorney was insolvent. It had better, therefore, be left to the prothonotary to make the proper inquiries in this matter, and ascertain whether Mr. Wright is solvent or no: in the mean time, let the rule be enlarged, and a copy be served upon Mr. Wright, to give him an opportunity of explaining.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly.

LANE v. PARSONS.

ROBERTS, on a former day, obtained a rule to shew cause why the interlocutory judgment, signed by the plaintiff, should not be set aside for irregularity, with costs, and that all further proceedings should in the mean time be stayed. The declaration was delivered on the 28th October, with notice to plead in four days. On the following day, a summons was taken out for further time to plead, returnable on the 31st; a consent however was indorsed upon the summons for four days. An order dated the 29th of October was drawn up accordingly, putting defendant under terms to plead issuably, rejoin gratis, and to take short notice of trial

Defendant, by a Judge's order, obtained "four days' time to plead," omitting the word "further:"—*Held*, that the time given by the Judge's order was to be computed from the date of the order, and not from the expiration of the original time to plead.

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for the 1st sittings in Term (a). On the 3rd of November, when the pleas were delivered at the office of plaintiff's attorney, it was discovered that interlocutory judgment had been previously signed on the same day. The case of *Aspinal v. Smith* (b) was cited to shew, that where time is given under a Judge's order, such time is not to be reckoned from the date of the order, but from the expiration of the original time to plead.

J. Jervis shewed cause, and contended, that the time must be computed from the date of the order, the defendant being then under terms to try at the next sittings, which distinguished the present case from that of *Aspinal v. Smith*. If it had been intended that the four days should be reckoned from the expiration of the original time to plead, then the order would have been for "four days further time." *Simpson v. Cooper*, lately before the Court, was decided under circumstances precisely similar, and must govern the present case. In the affidavit on which he shewed cause, it was stated that it had been agreed between the clerks of the respective attornies that the four days' time should be reckoned from the date of the order.

Roberts, in support of the rule.—In *Simpson v. Cooper* the seven days' time to plead was improperly applied for, or inadvertently granted, because, if the original and further time had been *severally* allowed to expire, the cause could not have been tried according to the terms of the order; but here, the defendant having delivered his plea on the 3rd, the plaintiff could have given his four days' notice, and tried on the 8th, which was the first day of the sittings in Term. If, according to the affidavit now put in, it was

(a) The first sittings were on the 8th November.

(b) 8 Taunt. 592; 2 Moore, 655.

agreed that the further time to plead should be computed from the date of the order, why was it not set forth on the face of the order, as it tended to alter the common and known practice of the Court?

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TINDAL, C. J.—By the Judge's order you gained but two days' time to plead, in addition to the original four days. The absence of the word "further," which is found generally in orders of this description, leads to such a conclusion, and it being also taken into consideration that the defendant was under terms, the Court are inclined to come to the same decision as in the case of *Simpson v. Cooper*, which is very similar to the present. The rule to set aside the judgment for irregularity must therefore be discharged, but may be made absolute for setting aside the judgment itself, upon the usual terms.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged.

BROOKS v. FARLAR.

STEPHEN, Serjeant, shewed cause against a rule nisi, obtained by *Bompas*, Serjt., for compelling the plaintiff to give particulars of his demand.

The action was brought to recover the amount of a bill of exchange, of which defendant was the drawer; and which bill it appeared had been given as the amount of certain goods sold and delivered. The declaration, as originally drawn, contained three counts, one on the bill and the others for the consideration and on an account stated; but the two last having been struck out, the count on the bill alone remained. He now took a preliminary

The Court will not compel a plaintiff to give particulars in an action on a bill of exchange, the declaration containing only one count, unless under particular circumstances.

A defendant need not give his addition in an affidavit made by him in the cause.

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objection to the affidavit of the defendant on which the rule was obtained, on the ground that it did not set forth the addition of the deponent, according to the direction of 1 Reg. Gen. Hil. T., 2 Will. 4, sec. 5, which requires "the addition of every person making an affidavit shall be inserted therein." The case of *Lawson v. Case* (a) is precisely in point.

GASELEE, J.—The case of *Jackson v. Chard* (b), which has been decided since the new rules, seems to obviate the necessity of a defendant in a cause giving his addition when making an affidavit. The description of defendant is sufficient to identify the party.

Stephen, Serjt.—As the declaration contains but one count, and that on the bill of exchange, it cannot be necessary to give a bill of particulars, because the cause of action is fully set forth on the face of the declaration, and the defendant cannot be misled. Besides, the affidavit should have stated in positive terms that the defendant did not know what the plaintiff was suing for; the only object must be delay.

Bompas, Serjt., in support of the rule, contended that where a bill of exchange was given for goods sold and delivered, the amount could not be recovered unless a consideration had been received. How could the party make a tender unless he knew the amount? and if he could not, he was precluded from a fair defence.

BOSANQUET, J.—No evidence would be necessary at the trial except proof of the bill.

Bompas, Serjt.—It might be an accommodation bill, and then the defendant would be obliged to prove a consideration.

(a) 1 Cr. & M. 481.

(b) Ante, Vol. 2, p. 469.

TINDAL, C. J.—As the declaration contains but one count on the bill of exchange, it cannot be necessary to grant a bill of particulars. If indeed there were additional counts for the consideration of such bill, the plaintiff failing on the first count could rely upon the others, and then it might be necessary for the defendant to ascertain the particulars of demand; but upon a mere bill of exchange, where the instrument speaks for itself, no order for particulars can be granted unless a very strong case has been made out by the defendant; but as the present does not appear to warrant the Court coming to such a conclusion, I think this rule must be discharged.

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The rest of the Court concurred.

Rule discharged, with costs.

Re SCHOLEFIELD.

WILDE, Serjt., applied to the Court to receive the acknowledgment of a married woman made before commissioners in the country under the Fines and Recoveries Act (a). The only question which arose upon this case was, whether the affidavit verifying the certificate was sufficient, it having been made by one of the commissioners, who was also concerned as an attorney in taking the acknowledgment. The rule of Hil. Term, 1834 (b), as to the uninterested commissioner examining the wife, had been complied with, and the proper inquiries had been made. He now contended that there was no clause in the Gen. Rules made in pursuance of the Fines and Recoveries Act excluding the commissioner who was also interested as an attorney in taking the acknowledgment

Affidavit verifying commissioners' certificate under Fines and Recoveries Act, may in some cases be made by one of the commissioners, being also the attorney for taking the acknowledgment.

(a) 3 & 4 Will. 4, c. 74.

(b) Ante, Vol. 2, pp. 789 and 833.

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from making the affidavit. They merely stated that one of the commissioners must be uninterested, and the uninterested commissioner is to make the inquiry. It would lead to great expenses if in all cases a third party (who must necessarily be a practising attorney) is to be brought there to make the affidavit in verification of the certificate, and who in each case would have to satisfy himself that the preliminary inquiries had been made, and also as to the identity of the party. The supplemental rule of Trin. Term, 4 Will. 4 (a), appears to recognise the right of a commissioner to make the affidavit, by stating that where certain parts of the affidavit, verifying the certificate of acknowledgment, "cannot be deposed to *by a commissioner*, or by an attorney or solicitor, the same may be deposed to by some other person," &c. It was quite clear that the commissioner making the inquiries could not make the affidavit, as he would be verifying his own act; and there being but one other commissioner, he would from his own knowledge often be the most competent.

The Court inquired of Mr. Sherwood what the practice had hitherto been, who stated, that as often as it had been practicable, the affidavit was made by a third person.

TINDAL, C. J.—Little doubt can exist that the primary intention of the rules was, that the proceedings in taking an acknowledgment should have the treble sanction of the two commissioners and another person. When the rules were first drawn up, solicitors of the first eminence had been consulted respecting them; and they thought it an objection that the commissioners, who acted as it were in the capacity of judges, should also verify their own acts by affidavit; but it was afterwards considered that the purposes of justice would not be defeated by allowing a

(a) Ante, Vol. 2, p. 833.

contrary rule to exist where the circumstances of the case required it, and it was often a great matter of convenience, particularly in the country, that one of the commissioners should be allowed to make the affidavit. I therefore think that in this particular instance the acknowledgment should be received.

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GASELKE, J.—The rule of Trinity Term, 4 Will. 4, was drawn up by myself, because, in cases where parties were sent up to town to make their acknowledgment, the agents there not being able to make oath as to the identity of the married woman, it became necessary that the same might be deposed to by some other person who should be competent so to do.

VAUGHAN, J., and BOSANQUET, J., concurred.

Application granted.

DOE *d.* CAULFIELD *v.* ROE.

STEPHEN, Serjt., shewed cause against a rule nisi obtained by *Wilde*, Serjt., requiring the tenant in possession to shew cause why he should not enter into the recognizance and give the undertakings required by the 1 Geo. 4, c. 87, s. 1, where tenants hold under leases or agreements. The rule had been obtained on an affidavit containing the usual statement of facts, and that the tenant held under an agreement for a lease. A copy of it only was annexed to the affidavit. On examination of the original agreement, it appeared that it was unstamped at the time of obtaining the rule. The instrument was therefore invalid, and consequently did not comply with the requisites of the statute. It provided, that the rule might be granted on "producing the lease or agreement

If a landlord applies to the Court under the 1 Geo. 4, c. 87, s. 1, the instrument constituting the tenancy must be stamped at the time of moving. It is not sufficient, to stamp it after the rule is obtained, and before shewing cause. The motion cannot be made on a copy only.

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in writing, under which the tenant held any lands or tenements." Those words must, of course, mean a lease or agreement which was valid in point of law. It was true that the agreement had been stamped since the rule was obtained, but at the time of moving for it, no stamp was affixed. The lessor of the plaintiff could not, by his own act, render that a valid instrument, which, at the time of his application to the Court, was defective.

Wilde, Serjt., in support of the rule, contended, that if the agreement when produced on shewing cause against the rule was legally stamped, all that was necessary had been done. The statute only required a counterpart or a duplicate of the agreement. Here, a copy of the agreement had been produced, and it shewed that such a tenancy existed as brought the case within the statute. When the rule came to be discussed, and the agreement was produced, a proper stamp was affixed to it. The Court would not then inquire at what time it was so affixed. He cited *Rose v. Tomblinson* (a), where it was held, that although a cognovit containing terms of agreement must be stamped, it was sufficient to support an execution under it, if it was stamped by the time cause was shewn against a rule for setting aside the execution on the ground of its not having been stamped; and *Clark v. Jones* (b), where the Court of Exchequer refused to grant a rule to set aside a cognovit for want of a stamp, on the ground that it might be stamped before cause was shewn against the rule.

TINDAL, C. J., thought the objection insuperable, and observed, that if the fact of the instrument being unstamped had been made known to the Court at the time of moving for the rule nisi, it would not have been

(a) Ante, Vol. 3, p. 49.

(b) Ib. p. 277.

granted. The landlord could only apply to the Court on "producing the lease or agreement in writing." That must mean a valid agreement. Here, however, only a copy was produced, which was neither the original, nor the duplicate, nor the counterpart, at the time of moving for the rule, and when the original came to be produced, it appeared to be invalid for want of a stamp. The present rule must, therefore, be discharged.

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 d.
 CAULFIELD
 v.
 Roe.

The other Judges concurred.

Rule discharged.

VERE and Others v. MOORE.

THIS was an action brought by the plaintiffs against the defendant, as the drawer and indorser of a bill of exchange, which became due on the 24th June, eleven days after the last day of Trinity term. The venue in the action was laid in Surrey, and the plaintiffs having declared, the defendant pleaded that he had not received due notice of the dishonour of the bill. The cause was taken down to Guildford to be tried, but no counsel appearing for the defence, it was taken as an undefended cause, and the learned Judge who tried the cause granted a certificate for speedy execution, to the amount of 100%, a part of the amount recovered. On the taxation of costs, the prothonotary refused to allow the extra expenses which had been incurred in taking the cause down to Guildford, but taxed the costs as if it had been tried in London.

A plaintiff laying his venue out of London or Middlesex, for the purpose of obtaining speedy execution, if he succeeds, is entitled to his costs of trying in the place of trial, unless the venue has been so laid for the purpose of oppression.

The sizer now applied to review this taxation, on the ground, that the plaintiffs had a right to the full amount of costs incurred by them in trying the cause. It would be

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seen that the bill not being due until after the end of Trinity term, a judgment could not, if the venue were laid in London, have been obtained until the sittings after this term; and it was with a view, therefore, of obtaining speedy execution, that the venue was laid in Surrey. The defendant had no one but himself to blame in the transaction; for by pleading a plea, which he afterwards admitted to be false by his not appearing to support it, he urged the plaintiffs to go on with the action.

Wilde, Serjt., shewed cause in the first instance.—He contended that it was the duty of the prothonotary to exercise his discretion in all cases where the question was one of amount only. Rules were laid down by the Masters in such matters for their guidance, which must in all instances be strictly followed. Here, the plaintiffs having chosen to lay the venue, solely for their own convenience, in the county of Surrey, instead of London, they must pay the extra costs incurred by themselves, as it could not be said, that the defendant derived any benefit from the cause being taken out of the county where the transactions originally occurred.

TINDAL, C. J., asked the prothonotary what was the practice under such circumstances.

The prothonotary said that he had only acted in conformity with the practice usually adopted in this Court. He did not know how such matters were treated by the Masters in the Courts of King's Bench and Exchequer.

Thesiger, in reply, submitted, that it was necessary some rule should be laid down on the subject, as it was one of considerable importance.

TINDAL, C. J.—It is a point of some importance, and

before we give our judgment, we will ascertain the practice in the other Courts.

Cur. adv. vult.

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TINDAL, C. J., subsequently pronounced the judgment of the Court. He said that he had learned that there was no distinction made in taxation, on account of the venue, by the Masters of the King's Bench and Exchequer; but that if any case of pressure or hardship arose, it was referred to the Court. The plaintiff would therefore be entitled to his costs of trying in Surrey. As it was desirable that a uniform practice should exist, the better course would be to direct the taxation to be reviewed.

Rule accordingly.

EVELEIGH v. SALSURY.

THIS was an interpleader rule. After the rule nisi had been served, on the execution creditor as well as the claimant, and it had become due, neither party appeared.

W. H. Watson, on the part of the sheriff, produced an affidavit of service of the rule nisi on the execution creditor and the claimant, and moved that the sheriff might be allowed to withdraw.

The Court, after some consideration, ordered the sheriff to sell so much of the goods as amounted to the sheriff's poundage, and expenses of sale, subject to the opinion of the prothonotary, and to abandon the remainder of the goods seized; and that no proceedings should be taken against the sheriff, either by the execution creditor or the claimant; and that the sheriff should be discharged.

Rule accordingly.

Where on an interpleader rule, neither the plaintiff nor claimant appears, the Court will discharge the sheriff from actions by either of those parties, and permit him to levy his poundage and expenses, and abandon the remainder of the levy.

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the prothonotary was right in allowing the defendants the costs of all the pleas. They had been permitted by a learned Judge, and from the course which the plaintiff had taken in his declaration, it was impossible for the defendants to avoid pleading as they had.

Kelly, in support of the rule, contended that, as the plaintiff in his declaration only claimed one entire *sum*, and therefore must have entered his *nol. pros.* as to a part of that sum, the present case did not come within the meaning of the section, which applied only to the cases of a *nol. pros.* "entered upon any count, or as to part of any declaration." If costs were allowed to the defendants under such circumstances, the result would be, that the plaintiff must in all cases confine himself in his declaration to the exact sum which he sought to recover.

TINDAL, C. J., was of opinion, that according to the language of the statute, the defendant was entitled to reasonable costs in respect of the judgment of *nol. pros.* The only question was, whether under the circumstances the defendants had a right to the costs of all the pleas. It would, however, be extremely inconvenient to entertain an inquiry with respect to the propriety of the pleas, after a judgment of *nol. pros.* had been signed. If there was any thing objectionable in them, the plaintiff might have applied to strike them out before judgment. The present rule must, therefore, be discharged.

The other Judges concurred.

Rule discharged.

COURT OF KING'S BENCH.

Hilary Term.

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

DOWNING v. JENNINGS and Another.

ARCHBOLD shewed cause against a rule nisi, which had been obtained by *Talbot*, for judgment, as in case of a nonsuit. He took a preliminary objection to the rule which had been served on the plaintiff. The action was brought against several defendants; but in the rule, the plaintiff was required to shew cause, why the like judgment as in case of a nonsuit should not be signed by the "defendant." It was impossible for one defendant to obtain judgment, as in case of a nonsuit, in his own favour alone, but the application must be made by all the defendants. The present rule ought, therefore, to be discharged.

Where a defect in a rule is attributable to the officer of the Court, it may be amended without costs.

Talbot, in support of the rule, contended that, if there were any defect in it, the other parts of the proceeding cured it. The objection was merely founded on the omission of the letter "s," after the word "defendant," in the printed part of the rule. The title of the cause, however, was properly stated in the affidavit on which the rule had been obtained, in the rule itself, and in the affidavit of service. Under these circumstances, it was submitted, that the defect must be considered as cured.

PATTESON, J.—This omission of the letter "s" was by the officer of the Court, and therefore the defendant must

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be allowed to supply it. The course will be, therefore, that the rule must be amended by the defendant, but without costs, and it must then be re-served upon the plaintiff.

Rule accordingly.

Ex parte Barnes. 5 Dec. 1834.

Ex parte FRENCH.

Where an attorney has obtained a rule for his re-admission, but ill health has prevented him taking out his certificate, and he has not practised, he may be re-admitted in a subsequent year, on terms, without the usual notices.

WIGHTMAN applied to re-admit a gentleman as an attorney, without the usual notices, under the following circumstances, set forth in the affidavit supporting the application. The notices required by the practice had been given previous to the 31st of January 1835. On that day, a rule for his re-admission was obtained, but the applicant having the misfortune, very shortly afterwards, to break his leg, he was unable to practise, and therefore did not take out his certificate from that time to the present. He had not practised during that period, and therefore his application was, that he might be re-admitted nunc pro tunc, without giving the usual notices.

PATTESON, J.—He may be re-admitted, and without the usual notices, on payment of the duty on two certificates, and taking out his certificate for the current year.

Re-admitted accordingly.

KEMPENEERS v. HOLDING.

The fact of the damages and costs together amounting to more than the sum laid in the declaration is no ground for setting aside the ca. sa. in that action, or subsequent proceedings against the bail.

SIR F. POLLOCK shewed cause against a rule nisi, obtained by *Humfrey*, requiring the plaintiff to shew cause

aside the ca. sa. in that action, or subsequent proceedings against the bail.

why the writ of ca. sa., issued in the original action, and all subsequent proceedings thereon, as well as the writ of summons issued in this action against the bail, should not be set aside with costs, on the ground that the damages, together with the costs recovered in the original action, exceeded the amount of damages laid in the declaration. It was an action against the bail, and the affidavit of debt, on which the principal was arrested, claimed 200*l.* and upwards. In the declaration, the damages were laid at 300*l.* At the trial, the plaintiff recovered a verdict for 213*l.* 6*s.* 8*d.* The taxed costs amounted to 104*l.* 3*s.* 4*d.*; thus making a total of damages and costs amounting to 317*l.* 10*s.*, and therefore exceeding the sum of 300*l.*, the damages laid in the declaration. This, it was submitted, was no objection to the proceedings.

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Humfrey appeared in support of the rule.

PATTESON, J.—That difference surely can be no ground of objection to the plaintiff's proceedings. The present rule must be discharged, and with costs.

Rule discharged with costs.

—◆—
REX v. RICHARD HIGGINS.

(*Before the four Judges.*)

GREAVES had obtained a rule, calling upon the defendant to shew cause why the certiorari issued to remove an indictment against him for obstructing a public highway should not be quashed, and a procedendo issue, and why he should not pay to the prosecutor his costs incurred at the Hereford Michaelmas Sessions, 1835.

This Court cannot grant the prosecutor of an indictment for obstructing a highway, his costs at sessions, which have been rendered useless in consequence of

the defendant obtaining a certiorari for the removal of the indictment, no notice of the writ having been given until after defendant had given notice of trial, and the expenses had been incurred, although the writ had been issued long previously.

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It appeared, from the affidavits, that the indictment in question was found at the Michaelmas Sessions, 1834, to which the defendant pleaded at the Epiphany Sessions, 1835, and entered into recognizances to try at the then next sessions. No notice of trial was given either for the Easter or Summer Sessions following, but notice of trial was given by the defendant in due time for the Michaelmas Sessions, 1835. In pursuance of such notice the prosecutor prepared for trial, and he and his witnesses attended the sessions, which began on the 19th and ended on the evening of the 21st of October, and counsel was instructed in the case. Late on the last day of the sessions the defendant produced a certiorari, which had been issued under the fiat of Mr. J. *Littledale* in the March previous, and of which no notice had been given to the prosecutor. The notice of trial had not been countermanded (a).

Talfourd, Serjt., and *Kelly*, now shewed cause.—That part of the rule which asks for the costs at the sessions must be discharged. This Court has no jurisdiction over them. [Lord *Denman*, C. J.—Is there not a case on the subject in East? *Greaves* mentioned *Rex v. Bartum* (b).] There, the costs were incurred after the removal of the indictment. No case can be found where this Court has ordered costs in another Court to be paid. If the certiorari be not quashed, the Judge who tries the case may give these costs.

Maule, and *Greaves*, contra.—The Judge could not

(a) The Court having quashed the certiorari on the merits, the facts and arguments on this point are omitted. *Maule* and *Greaves* contended that the certiorari was taken away by the 13 Geo. 3, c.

78, s. 24, as an encroachment on a highway was an offence within s. 63, and referred to *Rex v. Bodenham*, Cowp. 78. But the Court gave no opinion on this point.

(b) 8 East, 269.

give these costs, for s. 64 of the 13 Geo. 3, c. 78, only applies to indictments for not repairing highways. As the costs at the sessions were caused by the wrongful act of the defendant, this Court will make him pay them, for that is the established practice of this Court in such cases; *Rex v. Bartrum*. The rule is laid by Lord *Holt* in *Rex v. Allen* (a):—"If the prosecutor gives notice of trial (though in an information) the first assizes, and does not proceed, the defendant must have costs. If the person indicted gives notice, the prosecutor shall have costs." [*Patteson, J.*—In the cases cited, the costs were after the case was in this Court.] The question here is, from what time the jurisdiction of this Court to order costs commences. It is submitted that it commences from the time the certiorari attaches, and although the certiorari in point of *fact* only attached at the time it was delivered in Court, still, as in point of law the sessions are considered only as one day, and acts done at any time during their continuance are the same as if they were done on the first day, this Court, in order to effectuate justice, will consider this writ to have been delivered at the sitting of the Court on the first day of the sessions, and then this Court may order these costs to be paid. [*Coleridge, J.*—Can this Court grant costs in any case except where they are given by statute.] In *Rex v. Allen* and *Rex v. Bartrum*, no reference is made to the authority depending upon statute, but it seems to be put on the general authority of the Court. [*Lord Denman, C. J.*—Are you aware of *Rex v. Passman* (b)?] That case is distinguishable. There, the application was merely for costs, and the certiorari was admitted to be properly sued out, for the prosecutor had merely exercised the right he clearly had. That case does not overrule *Jones v. Davies* (c), which was recog-

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(a) Comb. 225.

(b) 1 Ad. & E. 603.

(c) 1 B. & C. 143.

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nised in *Stacey v. Evans* (a). Now those cases are strongly in favour of this rule, and, it is submitted, are good law.

LORD DENMAN, C. J.—The case of *Stacey v. Evans* appears to be founded on the authority of *Jones v. Davies*, and that case must be taken to be overruled by *Rex v. Passman*. As those cases, therefore, cannot now be considered as law, and as it has not been shewn that this Court has any authority to grant these costs, that part of the rule must be discharged, but the rule will be absolute for quashing the certiorari and issuing a procedendo.

PATTERSON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule accordingly.

GRINDALL v. GODMAN.

The Court will interfere with the discretion of the Master as to the number of counsel he allows on taxation, under special circumstances.

CRESSWELL shewed cause against a rule nisi obtained by *Wightman*, for reviewing the Master's taxation. The objection to the course pursued by the Master was, that he had allowed only one counsel instead of two for the defendant, at the trial of the cause. This was a mere matter of detail, peculiarly within the discretion of the Master; and it was the established practice of the Court, not to interfere with his discretion in such cases. Were an interference to take place in mere matters of detail, there would be a perpetual appeal from him to the Court, as it seldom occurred, that either party was satisfied with the taxation.

Wightman, in support of the rule, admitted that the general practice was as stated on the other side, but, in

(a) 13 Price, 449.

extreme cases, the Court was in the habit of interfering with the Master's discretion, and directing him to review his taxation. In the present case, it appeared from the affidavit on which the rule was obtained, that the plaintiff had subpoenaed seven witnesses, and some of them actually attended; the defendant had subpoenaed one witness. At the trial, no witnesses were called, the facts being admitted, subject to the opinion of the Court above on a question of law, as to how far a husband was liable for costs incurred in prosecuting him for an assault on his wife. It was true, therefore, that very little was necessary to be done at the trial by the counsel employed on the part of the defendant. That was, however, a matter which could not have been anticipated by the attorney, when he was preparing for trial. He was to look to the probabilities of what would occur, when the cause was tried. The probabilities were, that, from the nature of the case, it would be obstinately litigated. It would be necessary, therefore, to cross-examine the seven witnesses who would be called by the plaintiff. Various nice questions of law would arise as to the defendant's liability; for, under some circumstances, or to a certain extent, he would be liable; under other circumstances, and to the extent charged by the plaintiff, he would not be liable. The attorney, therefore, in preparing for trial, was perfectly right in delivering two briefs.

PATTESON, J.—I am always unwilling to interfere with the Master's taxation, as to matters peculiarly within his discretion, especially where it has been applied to questions of amount. In many instances they are matters of which I have no knowledge, and as to which, therefore, I can form no opinion. Here, however, I can judge of the question in dispute. It seems to me that two counsel ought to have been allowed. Antecedent to the trial,

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there was every reason to presume, that the counsel employed for the defendant would be required to make considerable exertions; the attorney, therefore, was right in delivering two briefs. At the trial it appears, that, by consent of both parties, the facts were not disputed, but admitted, subject to the question of law. It is a very useful practice that such arrangements should be made, as they tend materially to save the time of other suitors. I am very unwilling that any decision of mine should throw an impediment in the way of such a practice. The Master's taxation must consequently be reviewed; but I cannot avoid thinking, that if all the facts had been brought before the Master, as they have been before me, he would not have disallowed one of the counsel.

The present rule must therefore be made absolute, but without costs.

Rule absolute, without costs.

DOE *d.* WILLS *v.* ROE.

A declaration in ejectment dated the 8th instead of the 7th of Will. 4, is irregular; but if, from the date of the notice, the tenant must be aware of the term in which he is to appear, the defect is cured.

COOPER moved for judgment against the casual ejector. The peculiarity in the case was, that the declaration was dated in the 8th year instead of the 7th year of the present reign.

PATTESON, J. — In the case of *Doe d. Gowland v. Roe (a)*, the Court held a declaration in ejectment, entitled, "6 Will. 4," instead of "7 Will. 4," to be irregular. The present is the converse of that case, and therefore the proceedings are wrong.

Cooper then stated that the notice at the foot of the declaration was dated the 5th January, 1837; and re-

(a) Ante, p. 273.

quired the tenant in possession to appear in the next term.

PATTESON, J.—I think that, as the tenant could not have any doubt, after reading the date of the notice, as to the term in which he was to appear, you may take your rule.

Rule granted.

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CURLEWIS v. POCOCK.

THIS was an interpleader rule.

Wightman appeared on behalf of the claimant; *Bere* on behalf of the sheriff; and *Kelly* on behalf of the execution creditor.

It was suggested, that the question in dispute between the parties should be decided summarily by the Court. This was however objected to on behalf of the execution creditor.

The Court has no power under the Interpleader Act, to dispose summarily of the matter in dispute between the parties, who appear on the sheriff's rule, without the consent of both plaintiff and claimant.

COLERIDGE, J.—I have no power to dispose of this case summarily, without the consent both of the plaintiff and of the claimant. That is required in cases of applications under the first section of the 1 & 2 Will. 4, c. 58, and the sixth section of the act only gives me the same power as that granted by the first section.

An issue was then directed to try the matter in dispute, the execution creditor being made plaintiff.

Rule accordingly.

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REX v. The Justices of WARWICKSHIRE.

The title of an affidavit, on which a rule has been obtained, may be amended, on payment of costs, the opposite party having leave to file affidavits in reply.

DANIEL moved on the behalf of the prosecutor to enlarge the rule in this case, for a mandamus until Easter term, the prosecutor to be at liberty to amend the affidavit on which the rule was obtained, and for that purpose to take it off the file and re-swear it. The reason of this application was, that the affidavit on which the rule had been moved, was improperly entitled. It had been entitled "In the King's Bench, *The King v. The Justices of Warwickshire.*" This was irregular, as at the time the rule was moved for, there was no cause in Court. It should properly only have been entitled, "In the King's Bench." It was an enlarged rule, and there might be some doubt whether, under those circumstances, such an application was necessary. In the case of *Ex parte John Nohro (a)*, it was held to be irregular in moving for a rule nisi, to entitle the affidavits in any cause. It did not, however, appear in that case, whether they were entitled in the Court. In this case they were entitled in the Court as well as in a cause. The title of the cause, therefore, might, perhaps, be discarded as surplusage. But, for the sake of security, the present application was made to amend.

Miller appeared to oppose the application in the first instance. It was clear, on the authority of the case just cited, that the affidavits were improperly entitled, and therefore, if the rule were heard on them, it would be discharged with costs. If the present application were granted, the defendants ought to have liberty to file affidavits in reply, and ought to have the costs of the present application.

(a) 1 B. & C. 267.

PATTESON, J.—I think the affidavits may be taken off the file and amended: the defendants must be at liberty to make affidavits in reply; and have the costs of applying here to oppose the application.

Rule accordingly.

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GRINDLEY v. THORN.

CHILTON moved for leave to issue a writ of *distringas* against the defendant, for the purpose of compelling an appearance to the action under the circumstances disclosed in his affidavit. It was an action to recover compensation in damages for criminal conversation by the defendant with the plaintiff's wife. A writ of summons had been issued, and various attempts made to serve the defendant, but without success. Advertisements were put into the newspapers for the discovery either of the defendant or his place of abode; no information, however, could be obtained with respect to either. At length it was discovered, that there was a person who acted as the defendant's agent, in the receipt of rents arising from certain property of which he was the owner. The object of the present application was to allow the service of the writ of summons on the agent to be good service, either for the purpose of entering an appearance at once, or as preparatory to issuing a writ of *distringas*, for the purpose of compelling an appearance. It was true the plaintiff might obtain such a writ in order to proceed to outlawry, but that would not effectuate the plaintiff's intention. He was not desirous of outlawing the defendant, but of proceeding in the action and recovering damages. The usual practice had been, pursuant to the provisions of the Uniformity of Process Act, 2 Will. 4, c. 39, s. 3, to require three calls to be made at the defendant's place of abode,

The Court will not grant a writ of *distringas*, for the purpose of compelling an appearance where there has only been a service of the writ of summons on an agent of the defendant.

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the two last pursuant to appointments made, and the copy of the writ of summons to be left at the last call. Although this had been the practice in general, yet, as the words of the act of parliament only required, previous to the issue of the writ, that it should be made appear, "to the satisfaction of the Court out of which the process issued, or, in vacation, of any Judge of either of the said Courts, that any defendant has not been personally served with any writ of summons, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process," all that was necessary would be to shew that the defendant could not be served, or compelled to enter an appearance, by ordinary means. In *Hickman v. Dallimore* (a), the marginal note was, "Where it is clear that the defendant keeps out of the way to avoid being served, the Court will grant a distringas, although three calls and two appointments have not been made." On the words, therefore, of the statute, as well as the principle of this case, it was submitted that a writ of distringas might issue, either immediately or after service of the writ of summons, on the receiver of the defendant's rents.

PATTESON, J.—I am not aware of any case, or act of parliament, which will authorize me in granting a distringas in consequence of a service of a writ of summons on the mere agent of the defendant. I do not think that I can grant the application.

Rule refused.

(a) Ante, Vol. 4, p. 278.

SAVAGE v. LIPSCOME.

(*Before the Four Judges.*)

JAMES shewed cause against a rule obtained by *Kelly* for reviewing the Master's taxation. The plaintiff's attorney had been instructed to commence an action in debt for 26*l.*, and endorsed his writ accordingly for that amount. The defendant delivered a plea, which was a nullity, and judgment was signed. When the plaintiff's attorney issued execution, he was, for the first time, informed by his client, that the defendant had a cross demand, amounting to 9*l.*, against him. The plaintiff's attorney then gave the defendant credit for 9*l.*, and issued his execution for 23*l.*, the debt being 17*l.*, and the costs making up the difference.

Where the writ is issued for a sum above 20*l.*, and before execution, the plaintiff gives the defendant credit for a cross demand, which has not been pleaded, and thereby reduces the debt to a sum under 20*l.*, the Master should tax the costs upon the reduced scale; *Patteson, J.,* dissentiente.

Upon these facts *James* contended, that the Master was quite right in taxing the costs upon the larger scale. In the directions to taxing officers, Hill. T. 4 Will. 4 (a), it is directed, that "in all actions of assumpsit, debt, or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction for his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds, (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed." In this case a sum had been recovered, as appeared by the judgment, above 20*l.*, and the Master taxed the costs upon the judgment produced before him. There was no agreement between the parties, that a less sum should be taken in satisfaction of the debt, or any thing which would authorize the Master to tax on the reduced scale. The judgment now stood unsatisfied,

(a) Ante, Vol. 2, p. 485.

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except as to part of it, and the costs being incident to the judgment, and the judgment for a sum above 20*l.*, it was submitted that the costs of the plaintiff's attorney were correctly taxed.

Kelly, in support of the rule, produced an account sent by the plaintiff to the defendant, before the commencement of the action, in which the plaintiff gave the defendant credit for the 9*l.*, which made the balance which the plaintiff demanded only 17*l.*, and relied upon this fact to shew, that although the defendant's writ was endorsed for the 26*l.*, the action was really brought for the 17*l.*, and that the plaintiff's attorney was not entitled to tax his bill as for a debt above 20*l.*, when the real demand was only 17*l.*

James here suggested, that the plaintiff was under this difficulty, that the defendant might have pleaded the 9*l.* by way of set-off, had the action been commenced for the 17*l.* only.

Per Curiam, (*Patteson*, J., diss.)—We think the Master should tax these costs again. The plaintiff's attorney should not have headed his bill as a debt above 20*l.*, after he had given the defendant credit for the cross demand, and thereby reduced the real debt to a less sum. We think that the rule should be absolute, but without costs.

Rule absolute, without costs.

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REX v. The Sheriffs of LONDON, in a Cause of
TYLER v. STILL.

JAMES had obtained a rule to shew cause why an attachment against the above defendants should not be set aside, and why the plaintiff or his attorney should not pay the costs of the application.

When the defendant has put in bail, the plaintiff must except to such bail, before he can attach the sheriff for not bringing in the body, although the defendant has given notice of justification.

Ball shewed cause, and contended, that the sheriff was in contempt by not having brought in the body at the proper time. It appeared from the facts, that bail had been put in and perfected, but that the sheriff was one day too late in making his return. The only point, therefore, was as to the costs of obtaining this attachment, and whether the sheriff was compelled to pay them.

James contended, that there had been an irregularity on the part of the plaintiff, and therefore the rule must be absolute, without conditions. After the bail had been put in, it was the duty of the plaintiff's attorney to except to the bail, before he could rule the sheriff to bring in the body; and no exception had been entered. He cited *Cohn v. Davis* (a), and *Rogers v. Mapleback* (b), which cases had not been overruled. There, it was expressly laid down, that where the defendant has put in bail, before the plaintiff can rule the sheriff to bring in the body, he must except to the bail, and that, as regarded the sheriff, notice of justification of bail was no waiver of such default, though it might be as between the parties. It was a condition precedent to ruling the sheriff to bring in the body, and that the plaintiff not having performed it, he was irregular in seeking to bring the sheriff into contempt.

(a) 1 H. Black. 80.

(b) *Ib.* 106.

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COLERIDGE, J.—According to the doctrine laid down in the cases cited, it was the duty of the plaintiff's attorney to except to the bail, before ruling the sheriff. The rule to set aside the attachment against the sheriff must be made absolute.

Ball applied for the costs.

James submitted, that the sheriff should be paid his costs, having been brought there irregularly.

COLERIDGE, J.—The sheriff certainly ought not to pay costs. The rule must be absolute, without costs on either side.

Rule absolute, without costs.

LOVER v. TOLMIN.

Where a defendant has deposited money in Court, pursuant to 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit, and he succeeds, the rule for taking the money out of Court is nisi in the first instance.

ARCHBOLD moved for leave to take out of Court a sum of 84*l.*, which had been paid into Court, pursuant to 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit. The action had proceeded, and the defendant obtained a verdict. The time for moving for a new trial, or for arresting the judgment in the following term, had expired. No doubt, therefore, existed, on the language of the act, that the defendant was entitled to have the money out of Court. The only question was, whether the rule for that purpose was to be absolute or nisi in the first instance.

PATTESON, J. (after consulting with Mr. *Hill*, the clerk of the rules), said, that the rule must be nisi in the first instance.

Rule nisi granted.

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DOE dem. WATSON v. ROE.

TOMLINSON moved for the ordinary landlord's rule, under the 1 Geo. 4, c. 87, s. 1. Some difficulty had been suggested by the officer of the Court with respect to the title of the affidavit, on which the application was founded. The affidavit was entitled merely "Doe v. Roe," without stating the name of the lessor of the plaintiff.

In moving for the ordinary landlord's rule, under the 1 Geo. 4, c. 87, s. 1, the affidavit in support of the application must have the plaintiff's lessor's name in its title.

PATTESON, J.—The name of the lessor must be stated in the title of the affidavit. It may be amended, and the application renewed on more perfect materials.

Rule refused.

Ex parte WYATT.

J. BAYLEY applied for a rule absolute in the first instance for an attachment against a person named Colonel Rochfort, for his disobedience to a writ of habeas corpus, which had been directed to him, and which had been served upon him in the kingdom of France. The affidavits on which he moved disclosed the following facts:—The Colonel had eloped with Mr. Wyatt's wife, had taken her into the kingdom of France, and was now living with her there in a state of open adultery. With Mrs. Wyatt, he had taken the son of the applicant, and had for a long time past kept him from his father. Mr. Wyatt applied to have his son restored, but this was refused unless a sum of 1000*l.* was paid for his support. An application was then made for a writ of habeas corpus to bring up the body of the child, and that writ was served personally

Where a writ of habeas corpus has been served on a party in France, and which has not been obeyed, the Court will not grant a rule absolute in the first instance for an attachment on the ground of his disobedience, although the English proceeding has been recognised and ordered to be obeyed by the French tribunals; nor will the Court grant its warrant to apprehend the defendant for his contempt, under the 56 Geo. 3, c. 100, s. 2, it appearing that the person in question was confined in France.

hend the defendant for his contempt, under the 56 Geo. 3, c. 100, s. 2, it appearing that the person in question was confined in France.

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on the Colonel in Paris. An application had been made previous to this service to the French authorities, and the writ of habeas corpus had been recognised, and declared proper to be executed. In the service of the writ the French forms had been adopted (a). Under these circumstances, it was submitted, that the proceeding of the French tribunal would be recognised, in this country, by the English Courts, on the general principles of international law, and therefore that this Court would grant a rule absolute in the first instance, for an attachment, on the ground of the defendant's disobedience to the writ of habeas corpus. He cited *Hopcraft v. Fermor* (a), where the Court of Common Pleas granted a writ of attachment against a party for non-performance of an award, which had been made a rule of Court; a copy of the award, and a rule nisi for an attachment, having been served upon him at Boulogne, in the kingdom of France; and *Weatherhead v. Landles* (b), where the Court permitted a judgment to be signed on a sci. fa. after eight days from the return, the defendant residing abroad, but having had reasonable notice of the proceeding. The reason of the application being made for a rule absolute in the first in-

(a) The provision under which the French tribunals proceeded was Article 2123 of the Code Civil, the words of which are as follows:—"L'hypothèque judiciaire résulte des jugemens, soit contradictoires, soit par défaut, définitifs ou provisoires, en faveur de celui qui les a obtenus. Elle résulte aussi des reconnaissances ou vérifications, faites en jugement, des signatures apposées à un acte obligatoire sous seing privé.

"Elle peut s'exercer sur les immeubles actuels du débiteur et sur ceux qu'il pourra acquérir,

sauf aussi les modifications qui seront ci-après exprimées.

"Les décisions arbitrales n'emportent hypothèque qu'autant qu'elles sont revêtues de l'ordonnance judiciaire d'exécution.

"L'hypothèque ne peut pareillement résulter des jugemens rendus en pays étranger, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions contraires qui peuvent être dans les lois politiques ou dans les traités."

(b) 1 Bing. 378.

(c) Ante, p. 189.

stance was, that the defendant was now a prisoner for debt in the Marshalsea of this Court, and was making extraordinary efforts to arrange his debts with his creditors, and obtain his liberation and return to France. Unless, therefore, the application was granted in the form prayed, before he could be arrested on the attachment, supposing the rule to be made absolute for its issue, he would have removed himself out of the jurisdiction.

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PATTERSON, J.—The only effect, which the proceedings of the French tribunal can have upon the service of the writ of habeas corpus, is to render it equivalent to personal service of that writ. The French law cannot give any greater effect than is attached to it by the English law; nor can the law of France give me more authority with respect to my writ, than I have without that law. The present case is different from one in which it is sought to give effect to a foreign judgment. Here it is sought to give effect to a proceeding commenced in England. I cannot grant a rule absolute in the first instance for an attachment, as the defendant would have a right to be heard, before the writ of attachment could go. I can only grant you a rule nisi in the first instance.

Bayley suggested, that, under the 56 Geo. 3, c. 100, sec. 2, the Court might issue its warrant for disobedience to the writ. The words of that section were, “that if the person or persons to whom any writ of habeas corpus shall be directed according to the provisions of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall wilfully neglect or refuse to make a return, or pay obedience thereto, he, she, or they shall be deemed guilty of a contempt of the Court, under

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the seal whereof such writ shall have issued ; and it shall be lawful to and for the said Justice or Baron, before whom such writ shall be returnable, upon proof made by affidavit of wilful disobedience of the said writ, to issue a warrant under his hand and seal for the apprehending and bringing before him, or before some other Justice or Baron of the same Court, the person or persons so wilfully disobeying the said writ, in order to his, her, or their being bound to the King's majesty, with two sufficient sureties, in such sum as in the warrant shall be expressed, with condition to appear in the Court of which the said Justice or Baron is a Judge, at a day in the ensuing term to be mentioned in the said warrant, to answer the matter of contempt with which he, she, or they are charged ; and in case of neglect or refusal to become bound as aforesaid, it shall be lawful for such Justice or Baron to commit such person or persons so neglecting or refusing to the gaol or prison of the Court of which such Justice or Baron shall be Judge, there to remain until he, she, or they shall have become bound as aforesaid, or shall be discharged by order of the Court in term time, or by order of one of the Justices or Barons of the Court in vacation ; and the recognizance or recognizances to be taken thereupon, shall be returned and filed in the same Court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the Court to be discharged." In the present case, the defendant had been served with a writ of habeas corpus, and had not obeyed it ; he had therefore been guilty of a contempt of Court, and was liable to be apprehended on a warrant issued by the Court.

PATTESON, J.—That act only applies, as appears by the language of the first section, to persons confined, or restrained of their liberty within England, Wales, Berwick-upon-Tweed, Jersey, Guernsey, Man, and Ireland. Here,

it appears, that the applicant's child is in no one of those places. I cannot, therefore, grant the warrant. All I can do is, either to grant you a rule nisi for an attachment, for disobedience to the writ of habeas corpus, or a new writ of habeas corpus.

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J. Bayley elected to take the new writ.

Writ granted.

HAWLEY v. SHERLY.

HOGGINS shewed cause against a rule obtained by *Petersdorff*, for judgment as in case of a nonsuit. The objection he had to the rule was, that the plaintiff had taken the cause down once for trial, and although a new trial had been granted, yet he must be considered as having sufficiently complied with the statute. The present rule must therefore be discharged.

If a plaintiff has once taken his cause down to trial, although a new trial may be granted, and he has given fresh notice, pursuant to which he does not proceed, the defendant is not entitled to judgment in case of a nonsuit.

Petersdorff, in support of the rule, contended, that as the plaintiff had given a fresh notice of trial, which he had not carried into effect, he had been guilty of a default, which entitled the defendant to judgment as in case of a nonsuit, notwithstanding the cause having been once taken down to trial.

LITTLEDALE, J.—That is no objection. The plaintiff has complied with the statute, and therefore the present rule must be discharged. If the defendant chooses, he may take the cause down by proviso.

Rule discharged (a).

(a) See *Gilbert v. Kirkland*, ante, Vol. 2, p. 153, where Mr. Justice *Patteson*, after consulting the other Judges, pronounced a similar opinion; the cause having been

made a remanet, and a subsequent notice of trial having been given, on which the plaintiff did not proceed.

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HOWELL v. JACOBS.

A non. pros. for not entering the issue pursuant to rule, is irregular after notice of trial.

Where a plaintiff gave notice of trial, and the defendant afterwards signed judgment of non. pros., for not entering the issue pursuant to a rule for that purpose, it is a sufficient answer to a rule for a judgment as in case of a nonsuit, that the time for proceeding to trial expired pending a rule for setting aside the non. pros.

ARCHBOLD shewed cause against a rule for judgment as in case of a nonsuit. It was a town cause, the venue being laid in Middlesex. The plaintiff gave notice of trial for the sittings after Trinity Term, and so far he was bound to try, pursuant to his notice. After this, the defendant ruled the plaintiff to enter the issue in Trinity Term, issue having been joined in that Term. The plaintiff did not enter it, and the defendant signed judgment of non. pros. in consequence.

LITTLEDALE, J.—Such a judgment could not be regularly signed, after notice of trial given.

Archbold.—The plaintiff applied to set aside the judgment, and while proceedings for that purpose were pending, the time for proceeding to trial expired. The plaintiff therefore could not be considered as in default, since it was in consequence of the defendant's irregular judgment of non. pros. that the plaintiff had not proceeded to trial pursuant to his notice. The question then was, whether, when the defendant had by his own act prevented the plaintiff from proceeding to trial, pursuant to his notice, the defendant could be entitled to judgment as in case of a nonsuit.

Streeton was heard in support of the rule.

LITTLEDALE, J.—It seems to me that the defendant is too early in his application. After notice of trial given, the defendant could not sign judgment of non. pros., as the plaintiff was proceeding with the cause. It being the defendant's fault, that the plaintiff did not proceed pursuant to

his notice, for he could not proceed while the rule with respect to the judgment of non. pros. was pending, I think the present rule must be discharged, but without costs.

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Rule discharged, without costs.

Ex parte BILLINGS.

PLATT applied to re-admit an attorney. The affidavit on which he moved stated, that the applicant had been admitted in the year 1803, and had thence, till the year 1806, taken out his certificate. From that time until the month of November, 1836, he had discontinued to practise or take out a certificate, and had occupied himself, in the mean time, as an officer of the customs. The affidavit contained the other usual requisites for the purpose of obtaining re-admission.

The Court will not re-admit an attorney who has discontinued practice for thirty years.

LITTLEDALE, J.—I think, after a lapse of time to the extent of thirty years, without being in any way accustomed to legal practice, he is not fit to be re-admitted. There is a case of *Ex parte Frost*, in a note in 1 Chitty's Reports, 558, where the Court refused to re-admit an attorney for want of experience, arising from his having discontinued practice. I think, therefore, that the applicant ought not to be re-admitted.

Re-admission refused.

THOMAS v. LEWIS, Clerk.

CHILTON shewed cause against a rule nisi obtained by *V. Williams*, for reviewing the Master's taxation. The

Where a juror is withdrawn and the cause referred, but no

award made, and the cause being taken down again, the plaintiff succeeds, he is not entitled to the costs of the first attempt at trial.

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facts of the case, as they appeared from the affidavits, were these:—The cause was first taken down for trial at the Lent Assizes, 1836. When the case had proceeded to a certain extent, at the suggestion of the Court, a juror was withdrawn, and the cause referred to two arbitrators, with power to choose an umpire. An umpire was chosen, but no award was ever made. The cause was taken down a second time, and the plaintiff obtained a verdict. On taxation, the Master refused to allow the costs of the first attempt at trial. The plaintiff sought to have that taxation reviewed, on the ground that he was entitled to them. *Chilton* now submitted, that the general rule was, where a juror was withdrawn, that neither party was entitled to costs. No verdict had been found in this case, and therefore it was unlike *Payne v. Bailey* (a). There the plaintiff obtained a verdict, subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the defendant having refused to refer matters back, the verdict was set aside, and the rule for reference discharged. The plaintiff took the cause down to trial a second time, and a second time obtained a verdict. The Court held that he was entitled to the costs of both trials. The case of *Poole v. Selwood* (b) was to the same effect. But both cases were distinguishable from the present, as in each a verdict was found. The case of *Burchall v. Ballamy* (c) was supposed on the other side to be in *support* of the present application. In that case the cause had formerly gone down to trial, and had gone off upon a reference to arbitrators; but they never made any award. The cause then went down to a second trial, and the plaintiff obtained a verdict. A motion was afterwards made, on behalf of the plaintiff, for the direction of the Court to the Master, to allow the plaintiff the costs of going to trial at the former assizes. It was there stated, on the behalf of the defendant, that,

(a) 3 B. & B. 304.

(b) 1 Price, 310.

(c) 5 Bur. 2693.

though the Court of Common Pleas had recently extended this allowance of costs to other cases of the like kind with remanets, yet the Court of King's Bench had always confined it to the single case of the cause going off upon a remanet, and had never allowed it in any other, how similar soever it might appear. The Court, in order to make the practice of the two Courts correspond, directed that, for the future, in all cases where a cause goes down to trial, and goes off upon any occasion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going down to trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a remanet. In that case, however, the Court did not think it right to include the present motion in the directions for future cases, and therefore did not allow the present plaintiff the costs he applied for; because the practice of this Court had hitherto been against it. Some difficulty existed, in perceiving how this could be considered as an authority in favour of the present application, since, as far as the practice had gone, down to the time of that case, the practice had been against it, and since that case, it did not appear that any rule of Court had been made for the alteration of the practice, or that any case had been decided in accordance with such proposed alteration. On the contrary, so far as the practice had proceeded, it was against the present application. Thus, in *Smith v. Haile* (a), the Court held, that the party succeeding on a second trial, which was granted because a special case reserved on the first was imperfectly stated, is not entitled to the costs of the first trial. Again, in *Edwards v. Brown* (b), the Court held, that, if a venire de novo be awarded, the Court has no power over the costs of the application for

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(a) 6 T. R. 71.

(b) Ante, Vol. 1, p. 282.

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that writ. But this question was completely set at rest by the case of *Seely v. Powers* (a), where it was held, that if a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. That case was afterwards recognised in the case of *Waite v. Spurgin* (b). On the authority of these cases, as well as the general principle, it was submitted that the present rule ought to be discharged.

V. Williams, in support of the rule.—The question in this case was, whether, when a jury had been discharged from finding a verdict, and the case had gone off upon a reference which had become of no avail, the party who had obtained a verdict when the cause was taken down a second time, was entitled to have his costs of the proceedings which took place at the first assizes. It was to be observed, that no new trial had here taken place, and therefore the directions contained in 1 Reg. Gen. H. T. 2 Will. 4, s. 64 (c), that “if a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second,” did not apply. In the case of *Burchall v. Ballamy*, the Court intimated an opinion that, for the future, the practice should be in conformity with the present application. It was quite clear, according to the opinion expressed by the Court in that case, that, where the cause went off for want of jurors, if the plaintiff was successful on the second trial, he was entitled to the costs of the first attempt at trial. Those cases, where the costs of the first trial had been refused, were those in which the proceeding might be considered as a drawn

(a) Ante, Vol. 3, p. 372.

(b) Ante, Vol. 4, p. 575.

(c) Ante, Vol. 1, p. 191.

battle. In those cases nothing was decided, nor intended to be decided, by the step which the parties had taken in such a case. *Seely v. Powers*, as well as the case in which it was recognised, proceeded on that principle. But the present case was clearly distinguishable from both, because, when the parties agreed to refer the cause to arbitrators with certain powers, it was not their intention that it should end there, and be merely what might be called a drawn battle; but it was intended that the litigation should proceed until it was finally settled. The fact of no award being made could cause no difference, as that was not within the contemplation of either party when the cause was referred. Agreeing to the reference, therefore, could not operate as an abandonment of the costs by the plaintiff. Where the act of the plaintiff could not be construed into an abandonment of the costs of the first proceeding, and he was successful in the second, he was clearly entitled to his costs of the first, on the principle that *victus victori in expensis condemnandus*.

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COLERIDGE, J.—It does not appear that there is any case precisely in point. I must, therefore, decide this on principle; and I think it arranges itself more within the rule laid down in the case of *Seely v. Powers*, than any other. I think, therefore, that this rule must be discharged, but not with costs. I must take it that a juror was withdrawn. At that time it was contemplated that the cause would never come before a jury again; but that it would be settled by the reference. The arbitrators, however, never made an award. If the matter had stopped there, this would have been the ordinary case of a juror withdrawn, and then neither party would have been entitled to costs. But the parties go down a second time to trial. I do not see how the situation of either party is altered with regard to the costs of a trial which has come to nothing without the default of either. How has their

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situation, either in principle or equity, been altered? It is true, that the plaintiff was entitled to a verdict on the second trial; and he might have been entitled to a verdict on the first; but both parties agreed on the first occasion to a mode of discussing their differences which has doubled the expense of the inquiry, and which has failed, without the fault of any person. I think, therefore, that the plaintiff is not entitled to the costs incurred on the first occasion; and, in consequence, this rule must be discharged, but without costs.

Rule discharged, without costs.

DE RUTZEN v. JOHN.

Where a plaintiff has made several defaults in fulfilling his undertaking to proceed to trial, the Court will make him pay the costs of the last application to enlarge his peremptory undertaking.

V. WILLIAMS shewed cause against a rule obtained by *Evans*, for enlarging the plaintiff's peremptory undertaking. The delay of the plaintiff in proceeding to trial had been exceedingly vexatious. No less than five peremptory undertakings had been given by the plaintiff, and it was now sought to enlarge the fifth. If the Court should be of opinion that the reasons assigned for the proposed enlargement were sufficient, it would only be allowed on condition of paying the costs of this application. He cited *Percival v. Bird* (a), where the Court held, that the costs of enlarging a peremptory undertaking, on account of the absence of a material witness, must be paid by the plaintiff, and are not costs in the cause; and *Dennehaye v. Richardson* (b), in which it was held, that where the plaintiff has made several defaults in proceeding to trial, pursuant to his peremptory undertaking, the Court may make the payment of the costs of the last default a

(a) Ante, Vol. 4, p. 748.

(b) Ib. p. 564.

condition precedent to enlarging his last peremptory undertaking.

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Evans contended, that the ordinary practice was to make such costs merely costs in the cause.

LITTLEDALE, J.—If the peremptory undertaking is enlarged, the plaintiff must pay the costs of this application.

Rule accordingly.

GULLIVER *d.* HODSON *v.* SUMMERFIELD and Others.

G. T. WHITE moved for an attachment, for nonpayment of costs pursuant to an award. The only difficulty in the case was, as to whether one or three attachments should be issued. The award directed the costs to be paid, in equal proportions, by three different persons.

If an award directs costs to be paid in equal proportions by several persons, a separate attachment must be obtained against each for their nonpayment.

LITTLEDALE, J. (after consulting with Mr. Hill, the clerk of the rules).—You must have rules for separate attachments.

Rule accordingly.

SMITH *v.* RATHBONE.

THOMAS shewed cause against a rule obtained by *Busby*, for setting aside an interlocutory judgment, which had been signed for want of a plea. The time for pleading expired on the 1st of November. On that day an order was obtained, for seven days time to plead. Pleas were delivered on the 7th, but which were irregular, on account of their being unsigned by counsel. On the morning of the 8th, interlocutory judgment was signed

A plaintiff is not entitled to sign judgment for want of a plea, until the time for pleading has expired, although none but irregular pleas may have been delivered by the defendant.

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for want of a plea. No other pleas were delivered by the defendant. He cited *Kay v. Whitehead* (a), where it was held, that time to plead under a Judge's order is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires.

Busby, in support of the rule, contended that the defendant had the whole of the 8th, in which to deliver his pleas. The fact of the pleas delivered being irregular, did not interfere with the time allowed for pleading, as regular pleas might have been delivered at any time before the end of the 8th. He cited *Pepperell v. Burrell* (b), *Macher v. Billing* (c), and *Dakins v. Wagner* (d).

LITLEDALE, J.—The defendant had the whole of the seventh day, which was the 8th of the month, in which to plead. If the pleas delivered were irregular, the defendant might have delivered good ones at any time before 9 o'clock in the evening of the 8th of the month.

Thomas suggested, that the defendant had never delivered any but bad ones.

LITLEDALE, J.—That is immaterial as far as this judgment is concerned, as the defendant might have delivered good ones before the expiration of the seventh day; but here, the plaintiff signed his judgment on the morning of that day. The present rule must therefore be absolute, with costs, the defendant having two days time to plead.

Rule accordingly.

(a) 2 H. Bl. 35.

(b) Ante, Vol. 2, p. 674.

(c) Ante, Vol. 3, p. 246.

(d) Ante, Vol. 3, p. 535.

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MACKENZIE v. GAYFORD and Another.

HUMFREY shewed cause against a rule nisi obtained by *Mansel*, for setting aside the judgment in this case for irregularity. The objection was, that although the declaration was in debt, the plaintiff had signed interlocutory judgment. This, it was objected, was irregular, because the plaintiff ought to have signed final judgment. *Humfrey*, however, contended, that the plaintiff had a right, if he chose, to sign interlocutory, instead of final judgment, although it was an action of debt. The only effect of it would be, that he must execute a writ of inquiry. This was, however, for the benefit of the defendant.

It is no objection to an *interlocutory* judgment, that it is signed in an action of debt.

Mansel, in support of the rule, submitted, that, as the practice had always been to sign final and not interlocutory judgment in an action of debt, it was irregular to sign an interlocutory judgment.

LITTLEDALE, J.—There is no objection to the plaintiff signing interlocutory judgment in an action of debt. It is, in fact, mercy to the defendant. In an action of debt for not setting out tithes, a writ of inquiry would be instituted: so, also, a writ of inquiry would be instituted to ascertain the value of foreign coin, in the same form of action. The plaintiff may be a conscientious man, and does not choose to issue execution for his whole demand, without executing a writ of inquiry. The present rule must be discharged, with costs.

Rule discharged, with costs.

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DOE *d.* HEWSON *v.* ROE.

Where a surviving joint tenant, who is the sole person in possession, has been served, the Court will only allow judgment to be signed against him, although the name of the deceased joint tenant has been introduced into the proceedings.

BYLES moved for judgment against the casual ejector. The peculiarity in the case was, that only one of the parties against whom the action was brought, and to whom the notice was directed, was tenant in possession. The affidavit on which he moved stated, that a lease of the premises had originally been granted to two persons. One of them had died, and the lease survived to the other. The notice was directed to both, but the service was only on the survivor. This, he submitted, was sufficient, as it had been held, that service on one of several joint tenants was service upon all.

LITTLEDALE, J.—The rule of court is, that the service must be on the tenants in possession; but here, as there is only one person surviving, the name of the other might be left out of the proceedings altogether. You may have the rule for judgment against the person who has been served, but against him only.

Rule granted.

BLEWITT *v.* TREGONING.

The Court will not compel a third person to pay the costs of a defence on the mere allegation of "belief" that it has been carried on at his instance.

ERLE moved for a rule to shew cause why a person named Simmons should not pay the costs of the plaintiff in the above action. The application was founded on an affidavit, which stated that this action had been commenced against Tregoning, a tenant of Simmons, on a distinct undertaking by Simmons to Tregoning that it should be on his own responsibility, and that he would conduct the defence. The affidavit then proceeded to state, that the suit had been defended by Simmons the younger, the son of Simmons, against whom the application was made. In

1836, a rule was made absolute against Tregoning for entering judgment as of Easter Term, 1834. The affidavit stated, that the defendant had not instructed either attorney or counsel, or had any concern in shewing cause against the rule. It also stated the deponent's "belief," that Simmons, the elder, had given instructions in the matter. It was submitted, under these circumstances, that the Court had jurisdiction over Simmons, in order to compel him to pay the costs incurred by the plaintiff. It was like the ordinary case, in which a landlord put forward his tenant to defend an action for his own purposes, he, in fact, being the real defendant.

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LITTLEDALE, J., inquired if the affidavits stated any more than "belief" of Simmons having given instructions for the defence.

Erle stated that "belief" only was stated.

LITTLEDALE, J.—I think that is not sufficient. It would be carrying the jurisdiction of the Court too far, unless you shew that Simmons has done some act, or taken some step, in the cause.

Rule refused.

DOE *d.* WEEKS *v.* ROE.

R. v. RICHARDS moved for judgment against the casual ejector. It appeared from the affidavit on which he moved, that the property sought to be recovered was in the possession of the overseers of the parish. The declaration had been served on one of the overseers, but not on the other. This, it was submitted, was sufficient to entitle the lessor of the plaintiff to a judgment against the casual ejector. The overseers of the parish might be considered as joint tenants, and it had frequently been held

Where property in possession of parish overseers is sought to be recovered in ejectment, service on one is not sufficient to obtain judgment against all.

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that service on one of several joint tenants was service on all.

LITTLEDALE, J.—You can only have judgment against the parties who have been served.

Rule refused.

BIDDULPH v. GRAY.

The notice under the 48 Geo. 3, c. 123, s. 1, must be served on the plaintiff himself personally, and the latter does not waive the objection that it has not been so served, by appearing on the notice.

MANSEL moved to discharge a debtor out of custody, who had remained in execution for twelve successive calendar months, for a debt not exceeding 20*l.*, under 48 Geo. 3, c. 123, s. 1.

W. H. Watson opposed the application, in the first instance, on the ground that the notice, pursuant to 1 Reg. Gen. H. T. 2 W. 4, s. 90 (a), had not been served on the plaintiff, as was necessary, according to the decisions in *Kelly v. Dickinson* (b), and *Gordon v. Twine* (c).

Mansel contended, that although the service had not been effected personally on the plaintiff, the notice had been served on a servant to the landlord of the house in which the defendant lodged. It was true the affidavit did not go on to state that the servant had authority to receive notices or papers for him.

COLERIDGE, J.—That is not a sufficient service.

Mansel submitted, that the plaintiff had waived the objection to the supposed insufficiency of the service by appearing to take it.

(a) Ante, Vol. 1, p. 195.

(b) Ante, Vol. 1, p. 546.

(c) Ante, Vol. 4, p. 560.

COLERIDGE, J.—I do not think that his appearing here amounts to a waiver. He comes here to take the objection that he has not been duly served. The fact of his taking the objection shews he does not intend to waive it. If his appearance here amounted to a waiver, then, in all cases, no matter how faulty soever the service might be, the objection could never be taken. The defendant, therefore, is not entitled to his rule.

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Rule refused.

— *Such: Plaintiff. 21. 11. 37.*

STRANGE v. FREEMAN.

HEATON shewed cause against a rule nisi, obtained by *Barstow*, for setting aside the appearance entered by the plaintiff for the defendant, and all subsequent proceedings thereon. It was sworn, that the defendant had entered his appearance on the 15th of January, after the regular time for appearance to the writ of summons, and on the 16th, the plaintiff, not being aware of the appearance being entered by the defendant, entered one for him. He then filed his declaration, and gave notice to the defendant, signed judgment, served notice of a writ of inquiry, and on the 20th, took the defendant in execution on a ca. sa. It was submitted, that the application to the Court not having been made until the 25th, it was too late, as such applications ought to be made within four days from the time when the ground of objection arose.

If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the Court as soon as such steps are taken by the former as shew his intention to proceed on the appearance.

Barstow, in support of the rule, submitted, that the plaintiff was irregular in entering an appearance for the defendant, after one had been entered by the latter, for himself. With respect to the delay suggested on the other side, it could not be considered as unreasonable. The defendant was taken in execution on the 20th, his

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affidavit was sworn on the 24th, and the application was made on the 25th. The rule of Court (a) only required, that the application should be made within a "reasonable" time, which was not limited to four days, where a defendant was a prisoner. Under these circumstances, the present rule ought to be made absolute.

COLERIDGE, J.—Although the defendant had no notice that the plaintiff had entered an appearance for him, yet the notice of declaration and of inquiry must have informed him that the plaintiff was proceeding, and, therefore, the defendant ought to have come to the Court earlier. But, there being an affidavit of merits, the rule may be made absolute, on payment of costs.

Rule accordingly.

(a) 1 Reg. Gen. H. T., 2 Will. 4, s. 33.

GRIPPER v. Lord TEMPLEMORE.

If a plaintiff gives notice of trial for the third term after issue joined, and countermands that notice, it is too early to move for judgment as in case of a nonsuit, in that term.

F. ROBINSON moved for judgment as in case of a nonsuit. The affidavit on which he moved, stated that it was a town cause, and issue had been joined in last Trinity Term. The plaintiff gave notice of trial in last Michaelmas Term, for the second sittings in Hilary Term, and previous to them, he countermanded his notice. Some doubt existed, whether, under these circumstances, the defendant was entitled to the rule prayed. The Court decided in *Isaac v. Goodman* (b), that the defendant could not move for judgment as in case of a nonsuit in the same term as that in which issue was joined and default made. In the case of *Preedy v. Macfarlane* (c), the Court of Ex-

(b) Ante, Vol. 2, p. 34.

(c) Ib. p. 216.

chequer would not allow judgment as in case of a nonsuit to be moved for in the same term as that for which notice of trial had been given. In the present case, issue had been joined two terms previous to that for which notice of trial had been given, and in which the default had been committed. It was therefore different from the two cases cited. If the Court would not allow the defendant to have judgment as in case of a nonsuit under these circumstances, the effect would be, that the plaintiff might, by giving notice of trial for the third term, compel a defendant to wait until a fourth term before he could move, although no step had been taken in pursuance of the notice of trial.

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PATTESON, J.—In the latter of the cases cited, the judgment of the Court proceeded on the ground, that the defendant cannot have judgment as in case of a nonsuit in the same term as that in which the default was committed. Here, the motion is made in the same term as the default, and therefore, on the authority of that case, the rule cannot be granted.

Rule refused.

DOE *d.* GRANT *v.* ROE.

HUMFREY shewed cause against a rule nisi obtained by *Archbold* for setting aside the judgment which had been signed against the casual ejector, and admitting the landlord to defend the action, it being suggested that a copy of the declaration in ejectment had not been served upon him. The affidavits on which the rule had been obtained were irregular, as having been sworn before the clerk of the attorney who had been employed in making the application. Such affidavits could not be received, as they were in contravention of 1 Reg. Gen. H. T. 2 W.

An affidavit sworn before the clerk to an attorney, who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of 1 Reg. Gen. H. T. 2 Will. 4, s. 6.

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4, s. 6 (a), the words of which were, "When an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail." In this case, it was quite clear that the attorney's clerk, who had acted as commissioner in taking these affidavits, had committed a breach of the rule of court, and therefore they could not be read.

Archbold, in support of the rule, contended, that the rule of court to which reference had been made, only applied to cases where the clerk was the clerk of the attorney on the record; but in the present instance the commissioner was not the clerk to the attorney on the record, but of the attorney to the landlord, who sought to be made a party to the proceeding. The nature of the application itself shewed that he was not the attorney on the record. The case therefore did not come within the provisions of the rule.

COLERIDGE, J.—I think I must hear the affidavits.

The merits of the case were then discussed and disposed of.

(a) Ante, Vol. 1, p. 184.

HODGSON v. TOWNING.


Where a defendant has been arrested on a ca. sa., to execute which, the sheriff's officer has broken an outer door, the Court will discharge him out of custody on a summary application.

N. CLARKE shewed cause against a rule obtained by *Whitehurst*, for discharging the defendant out of custody

the Court will discharge him out of custody on a summary application.

on a writ of *capias ad satisfaciendum*, on the ground of the sheriff's officer having committed a trespass in the execution of the writ, by breaking open an outer door in order to effect the caption. This, it was submitted, was not a ground for making the present rule absolute for the discharge of the defendant. If the sheriff had acted improperly in breaking an outer door, the defendant had his remedy by action against that officer. That, however, did not interfere with the right of the plaintiff to detain the body of the defendant in custody. No case had actually decided this question. In *Lee v. Gansel* (a), it was decided that a bailiff, in execution of mesne process, may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house. That decision, as far as it proceeded, might be considered as unfavourable to the present application. The Court there abstained from giving any opinion as to the relief which would be extended, supposing the arrest to have been illegal, but it intimated that the discharge of the defendant out of custody was by no means a matter of course. In the case of *Lloyd v. Sandilands* (b), the same principle was extended to the case of an internal window *being broken*, peaceable entrance having been obtained at the outer door. Under these circumstances, as the defendant was left with his remedy against the sheriff, in case the Court should not interfere summarily, the present rule must be discharged.

Whitehurst, in support of the rule, submitted, that it was the ordinary practice of the Court, in case of any irregularity being committed in the arrest of a defendant, to discharge him out of custody on a summary application. That depended on the equitable jurisdiction of the Court, which was ordinarily exercised in favour of the liberty of

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(a) Cowper, 1.

(b) 8 Taunt. 250.

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the subject. It was true that no case had been decided directly on the point, but the language of Lord *Mansfield* in *Lee v. Gansel*, although obiter, was in favour of the present application. His Lordship said, "With regard to the point of relief, in case the arrest had been illegal, I give no opinion, though I think it would depend upon the behaviour of the party applying. It is possible a person might come to ask that relief under circumstances of such gross misbehaviour as might induce the Court to refuse it. Though the Court, when a person is arrested who has been attending its process, will interpose, not only by punishing the officer, but by discharging the prisoner out of custody; yet cases of this sort are always matters of discretion with the Court, under their particular circumstances." It being therefore a matter of discretion, the Court would, in favour of the liberty of the subject, be inclined to liberate the defendant. He cited *Yates v. Delamayne* (a), in which case the officer had forcibly broken into a house, and made a levy on the defendant's goods; and there, the Court set aside the execution.

PATTESON, J.—Under these circumstances, I think the rule must be made absolute.

Rule absolute.

(a) Bac. Ab., Execution, n.

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 SCAITH v. BROWN.

Where a cause
 has been re-
 moved from
 the Palace
 Court, the de-
 fendant's bail

cannot render him to the county gaol, pursuant to the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, the Palace Court not being a *superior* court of record, within the meaning of that act; and the plaintiff does not waive the objection by declaring against the defendant as in the custody of the Marshal of the King's Bench.

ERLE shewed cause against a rule nisi obtained by *Humfrey*, for setting aside the writ of procedendo issued in this case, with costs. The action had originally been

commenced in the Palace Court, and the defendant arrested. A rule for better bail had been served on the defendant, and he had time to justify, until the 24th of October. On the 20th, the bail above rendered the defendant to the county gaol of Middlesex, pursuant to the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21. When bail was first put in, the plaintiff declared *de bene esse*. Bail not being perfected on the 24th, a writ of *procedendo* issued on the 25th. It was now sought to set aside that writ on two grounds; the first, that the defendant had been regularly surrendered to the county gaol, pursuant to the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21; and, secondly, that if the render was not good, the plaintiff had waived the objection, by declaring against the defendant as in the custody of the marshal of the Marshalsea of this Court. As to the first objection, it depended on the language of the section referred to. The words of that were, "that a defendant, who shall have been held to bail upon any mesne process, issued out of any of his Majesty's superior courts of record, may be rendered in discharge of his bail, either to the prison of the Court out of which such process issued, according to the practice of such Court, or to the common gaol of the county in which he was so arrested." By the old practice, the render must have been to the prison of the Court out of which the process issued, unless he was in the custody of the gaoler of this Court. That section merely altered the practice as to the place to which the render might be made. Its language, however, confined its operation to cases where the defendant was held to bail on mesne process from a superior Court. Here, however, the defendant had been held to bail on process from the Palace Court. The provision in question, therefore, did not apply, and therefore a render to the county gaol was no render in point of law. If the Palace Court was a superior court of record, the render should have been to the gaol of the Palace Court, of which there was a gaoler,

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whose duty it was to keep prisoners who might be brought there. Next, as to the question of waiver. It was contended, that the bail had, in fact, been waived, by the plaintiff declaring against the defendant as in the custody of the marshal of the Marshalsea of this Court, he having thus indirectly admitted that the cause had been properly removed here. This was, however, no waiver. The plaintiff had a right to declare *de bene esse*, when bail was first put in. The question then was, as to the form of declaration which the plaintiff was to adopt. It would be unsafe for him to adopt the form given by 15 Reg. Gen. M. T., 3 Will. 4 (a), for they were introduced in pursuance of the Uniformity of Process Act; and by section 19, it was provided, that nothing in that act contained should "extend to any cause removed into either of the said Courts by writs of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise." The only safe course for the plaintiff to pursue, therefore, was, to make use of the old form in existence previous to the passing of that act. The declaration being *de bene esse*, did not, of course, admit the defendant to be properly in the superior Court, until bail should be perfected. The new form, at the commencement of the declaration, could not alter the nature of the declaration itself. On both points, therefore, the plaintiff was entitled to have this rule discharged.

Humfrey, in support of the rule, submitted, that this was a good render, within the meaning of the section referred to. The intention of that act of parliament clearly was to operate on all cases, in which arrest for debt was allowed. For that purpose, all Courts having jurisdiction to arrest for debt must be considered as superior Courts. Whether or not, this must be considered as a *casus omisus* which had not yet been decided. That this, however,

(a) Ante, Vol. 1, p. 474.

must be considered as the intention of the Legislature, and was so considered by the Courts, appeared from the case of *Stride v. Hill* (a). There, it was intimated by the Court, that Dover Castle was the county gaol, upon an arrest in the cinque ports, to which to render a defendant, within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21. There, Mr. Baron *Parke* observed, "It rather appears to me, that that clause of the act was intended to apply to all cases of render, and that Dover Castle must be considered the county gaol of the cinque ports, or in the nature of the county gaol." It was not a more extended construction to consider the Palace Court in the nature of a superior court of record, than it was to consider Dover Castle in the nature of a county gaol. Then, with respect to the waiver, as the plaintiff thought proper to declare against the defendant as in this Court, he clearly admitted that the cause had been properly removed. It was, lastly, to be observed, that this was an application by the bail, in order that they might be enabled to render the defendant, which they could not in the inferior Court.

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COLERIDGE, J.—It appears to me that the render here was irregular. This case is quite different from that referred to, with respect to Dover Castle. The gaol of the cinque ports might be the county gaol for the purpose of a render, but I do not think that makes the Palace Court a *superior* Court of record. I do not think the objection has been waived by the plaintiff's declaration. The present rule may be absolute, on payment by the bail of all the costs attendant on setting aside the writ of *procedendo*.

Rule absolute accordingly.

(a) Ante, Vol. 4, p. 709.

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BRADY v. VEERES.

Where it appears, by the declaration in a cause instituted in an inferior jurisdiction, that the sum claimed by the plaintiff is exactly 20*l.*, it is not necessary to enter into the recognizance required by the 19 Geo. 3, c. 70, s. 6, and the 7 & 8 Geo. 4, c. 71, s. 6, in order to remove it into a superior court.

BUSBY shewed cause against a rule nisi obtained by *Denman Whatley*, for issuing a procedendo to remit the cause to the inferior jurisdiction from which it had been removed, on the ground of the recognizances required by the 19th Geo. 3, c. 70, s. 6, and the 7 & 8 Geo. 4, c. 71, s. 6, not having been entered into. It was contended that such recognizances were unnecessary, inasmuch as the cause of action appeared on the face of the proceedings to be exactly 20*l.* The latter act, which extended the provisions of the 19th Geo. 3 to causes of action amounting to 20*l.*, did not alter the provisions of the former act in any other way, and consequently, the cases which had been decided on that former act would be applicable in principle to those which might arise under the latter act. Here, the sum sought to be recovered, as appeared by the process and declaration, was 20*l.*, and in *Atterborough v. Hardy* (a), which was a case under the 19 Geo. 3, c. 70, s. 6, the Court held, that where the damages in the declaration were laid at 10*l.* and upwards, the defendant might remove the cause without entering into the recognizance. The words of the section of the 19 Geo. 3, in question, were quite clear, independent of the case cited. They were, "that no cause, where the cause of action shall *not* amount to the sum of 10*l.* or upwards, shall be removed or removeable into any superior court by any writ of habeas corpus, or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into the like recognizance for payment of the debt and costs, in case judgment shall pass against him." From this, it was evident, applying the provision of that section to causes of action amounting to 20*l.*, that where the cause of action did amount to that sum, the recognizance was not necessary. The present rule ought therefore to be discharged.

(a) 2 B. & C. 802.

Denman Whatley, in support of the rule, produced affidavits, from which, it appeared that the sum sought to be recovered by the plaintiff was less than 20%.

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LITTLEDALE, J.—Has not the plaintiff precluded himself from his right to require the recognizance in this case by laying his demand at 20%?

Denman Whatley contended that he had not deprived himself of that right by merely laying his demand at 20%, when it was sworn, that he really did not seek to recover so great a sum.

LITTLEDALE, J.—From the case which has been cited, it appears that the demand laid in the declaration is the sum to which the Court must look, and of which, it can take judicial notice. I think, therefore, that as the sum claimed in the declaration is 20%, the case is not within either of the statutes, and therefore that no recognizance need be entered into. I also think that the plaintiff must pay the costs of this application. The present rule will therefore be discharged, with costs.

Rule discharged, with costs.

HOWARD v. CANFIELD.

V. LEE shewed cause against a rule obtained by *Byles* for a new trial, on the ground of the improper admission of evidence. A witness had been called on the part of the plaintiff to prove a portion of his demand, but it appeared, on inquiry, that he had no recollection of what he was called upon to prove except by reference to his book. The book however was not produced. The statement of the witness, as to the fact, was taken by the un-

Where a witness refreshes his memory, with respect to a particular fact, by a memorandum, it must be produced.

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der-sheriff on his notes. The ground of the motion was, that the statement of the witness was inadmissible unless the book was produced. It was submitted, that every day's practice at *Nisi Prius* authorized a witness to look at a memorandum in his own handwriting, in order to refresh his memory. The admission therefore of this evidence was only in conformity with that practice.

Byles, in support of the rule, submitted that the evidence could not be admitted without the production of the book itself. He cited *Doe d. Church v. Perkins (a)*, where it was held that a witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, the original book or paper must be produced. If the original paper were not produced, a door would be opened to the easy commission of fraud and perjury. Nothing would be easier than for a witness to say that he had seen a memorandum which enabled him to recollect the fact, although the memorandum might have been made on the same day, and if the memorandum were not produced, there would be no adequate means of cross-examining him.

COLERIDGE, J.—I am of opinion, that as the witness spoke from the memorandum, it ought to have been produced. It does not appear that he had any recollection without the assistance of his book. The rule for a new trial must be made absolute.

Rule absolute.

(a) 3 T. R. 749.

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GRANT v. FLOWER.

TEMPLE shewed cause against a rule nisi obtained by *Barstow*, for setting aside the interlocutory judgment in this case, on the ground of irregularity. It was submitted that the application was too late. The writ issued on the 1st August, and was served on the 17th September. An appearance was entered on the 21st October, and on the 25th the plaintiff declared. On the 29th a summons was taken out to set aside the proceedings for irregularity, and which was attended before Lord *Denman*, C. J., on the 31st. His Lordship dismissed the application. On the 2d of November the defendant's attorney attended at the office of plaintiff's attorney, and examined the writ. On the 5th November interlocutory judgment was signed for want of a plea, and on the 8th a letter was sent to the defendant, stating the judgment to have been so signed. Between the 8th and the 17th no step was taken by the defendant or his attorney, and on the latter day a rule nisi to compute, which would be due on the 21st, was served. On the 22d the present rule was obtained. This, it was submitted, was too late, and the present rule must consequently be discharged.

If a plaintiff seeks to set aside an interlocutory judgment for irregularity, he must come to the Court within a reasonable time from his knowing that it is signed, and cannot wait until a rule to compute is served.

Barstow, in support of the rule, submitted that the defendant had come to the Court sufficiently early, as the time within which the application ought to be made did not begin to run until the rule to compute was served.

LITTLEDALE, J.—I think you are too late. The time for making the application to set aside the judgment begins to run from the time that notice was received of judgment being signed. The present rule must therefore be discharged.

Rule discharged accordingly.

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DOE *d.* TINDAL *v.* ROE.

Where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant, but they refused to make the defendant's attorney pay the costs, because he was not present at the trial when the objection was taken, and had given no instructions to the counsel to do so.

THIS was an ejectment by landlord against tenant—the tenancy having been determined by notice to quit. The London agent of the plaintiff's attorney had procured the agent of the defendant's attorney to admit the lease and the notice to quit at the trial, without further proof than their production; and a judge's order was drawn up by consent, directing the defendant to admit the documents specified in the notice served upon him. At the trial before Lord *Abinger*, at the last assizes for Sussex, the judge's order was produced, with the notice to admit pinned to it; and the lease and notice to quit were tendered in evidence; but an objection was taken by the defendant's counsel, that it was not sufficiently shewn, that the notice produced was the notice to which the judge's order referred, and it was said that the learned Judge should either have put his initials to the notice, or the notice should have been annexed to the order at the time it was signed, and the order should have referred to it as such. The learned Judge held the objection to be a good one, and that the plaintiff must be nonsuited; but said, that if it should appear that the documents tendered in evidence were in truth the documents which had been agreed to be admitted by the defendant, the defendant's attorney would have to pay the costs of the nonsuit. The defendant's counsel and his attorney still persisting in refusing to admit the documents in evidence, the plaintiff was nonsuited. In the following term, a rule nisi was obtained for setting aside the nonsuit, and for a new trial, and that the defendant or his attorney might pay the costs of the first trial, and also of the application, upon an affidavit of the plaintiff's attorney, that the defendant's agent in London had agreed to admit the lease and notice to quit, tendered in evidence, without further proof.

Channel shewed cause, upon an affidavit of the defendant's attorney, that he did not himself attend the trial, but instructed another attorney to attend for him; and that he gave no instructions to counsel to take such an objection. The attorney who attended the trial also made an affidavit, that he merely handed over the brief to counsel, and attended the trial, but knew nothing of what had been previously done in the action. It was contended that, under these circumstances, the attorney was not liable to pay the costs.

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Platt and *Hughes*, in support of the rule, contended that it was a breach of faith, and contempt of the judge's order, to refuse to admit the documents, and that the attorney was liable for the act of his agent, who attended the trial; and that as the latter had allowed the objection to be taken, and refused to admit the documents in evidence, after the Judge had distinctly told him of the consequences, it was a case in which the Court ought to make the attorney pay costs.

COLERIDGE, J.—There is no doubt that the rule must be made absolute, with costs; but I think it would be too much to make the attorney pay costs, as he did not himself attend the trial. So much of the rule therefore as calls on the defendant's attorney to pay costs will be discharged, and the other part of the rule will be absolute, with costs against the defendant.

Rule accordingly.

MORTON v. BURN and Another.

W. H. Watson shewed cause against a rule nisi obtained by *Edwards*, requiring the plaintiff to shew cause - Where a Judge has made an order for speedy execution, under 1 Will. 4, c. 7, s. 4, and the defendant at once pays over the sum in question, and a motion for a new trial is afterwards made, the Court will not order the plaintiff to pay the sum he has received into court during the pendency of that rule.

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why the plaintiff should not pay into court the debt and costs already paid by the defendant, in order to remain there until the rule for arresting the judgment, which had been obtained, should be disposed of. It appeared from the affidavits, that the case had been tried at the sittings after last Michaelmas Term, and a verdict obtained by the plaintiff. An application was made to the learned Judge who tried the cause, for speedy execution. A certificate was accordingly granted, under 1 W. 4, c. 7, s. 2. Before the execution issued, however, the defendant paid the debt and costs to the plaintiff.

At the commencement of the present term, the defendant obtained a rule nisi for arresting the judgment. After obtaining that rule, the present was obtained, requiring the plaintiff to pay into court the money he had received in consequence of the certificate, there to remain until the Court had determined whether the judgment should be arrested or not. It was submitted, however, that the Court had no power, under the section of the act, pursuant to which, the certificate had been granted, to direct this money to be taken out of the hands of the plaintiff. The words of the fourth section of the act were, "that notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the Court in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon, the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by a writ of error or otherwise, as the Court may think fit to direct." The power to restore the defendant to what he had lost in consequence of the certificate, only existed where it appeared by the judgment of the Court that he was entitled to a decision in his favour.

At present, however, as the Court had not decided upon the rule for arresting judgment, it did not appear that he was entitled to any such restoration.

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Edwards, in support of the rule, contended that the Court had power under the last words of the section, "or otherwise, as the Court may think fit to direct," to make the plaintiff pay this money into court.

PATTESON, J.—I feel some doubt as to whether I can grant the present application. I will however communicate with the other Judges on the point.

Cur. adv. vult.

PATTESON, J.—After much consideration on this subject, I am of opinion that I have no power to grant the rule now prayed for, under 1 Will. 4, c. 7, s. 4. That section can only be considered as applying to cases in which the Court has determined finally on the matter, by ordering the judgment to be vacated, by staying or setting aside execution, by arresting the judgment, or granting a new trial or new writ of inquiry. But at present, the matter is under discussion, and the Court has not disposed of the case, in any one of the ways mentioned in the statute. The final words of the section, "or otherwise, as the Court may think fit to direct," have only reference to cases in which the Court has disposed of the matter in any one of the ways mentioned in the former part of the section. Here, however, the Court not having disposed of the case, the defendant cannot "be restored to all that he may have lost," for it is not yet certain that he has lost anything. I was desirous of granting this rule, if I could, under the general practice of the Court, without reference to the statute in question, by analogy to proceedings after a writ of error has issued. The practice in those cases is, that if the writ of error is sued out after execution issued,

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but before levy made, it operates as a supersedeas of the execution, and the Court stays it. But, if a levy has been made, and the money paid over to the plaintiff, the Court will not interfere summarily, but will leave the party to his remedy by writ of restitution. I think, therefore, that the Court has not power to interfere in the way required. The present rule must therefore be discharged. I have, however, spoken to the other Judges, and they have directed that this new trial shall not be put into the new trial paper, and thus delay the determination of the Court, but that it shall come on as a motion.

Rule discharged accordingly.

HART v. The Rev. GEORGE WATKIN MARSH.

(Before the Four Judges.)

A prohibition does not lie after sentence, unless it appears by the sentence that the Ecclesiastical Court has pronounced on matters conusable at common law, although there are several articles contained in the libel, some of which are so conusable.

MAULE and *Cleasby* shewed cause against a rule nisi obtained by *R. V. Richards* for a prohibition to be issued to the Consistory Court of Hereford, and to the Arches Court of Canterbury, prohibiting them from further proceeding in this suit. It appeared that a suit had been commenced in the Consistory Court of Hereford by the promoter, who was the churchwarden of the parish of Hope Bowdler, against the defendant, who was its rector. The libel contained thirty-one articles, which charged the defendant with various offences, and the Court pronounced sentence of suspension. The defendant then appealed to the Court of Arches, and it was during the pendency of the appeal, that the present application was made for a prohibition. The material articles in the libel were the first, fifteenth, sixteenth, and seventeenth, and were as follows:—

“1st. We article and object to you, the said *George Watkin Marsh*, that by the ecclesiastical laws, canons, and constitutions of the Church of England, all clerks and

ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, assaultings, quarrelling, fighting, profligacy, or any other excess whatever, and for being guilty of any indecency themselves, or encouraging the same in others; and furthermore, they are enjoined and required to abstain from resorting to any taverns or ale-houses, and not to give themselves to any base or servile labour, nor to drinking or riot, nor to absent themselves from their benefices without supplying curates that are sufficient and licensed preachers, and are also enjoined and required to visit the sick, and to instruct and comfort them in their distress, and not to forsake their calling, and use themselves in the course of their lives as laymen; but that, on the contrary, they are enjoined at all convenient times to hear and read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit of the Church of God; bearing in mind that they ought to excel all others in purity of life, and to be examples to other people, under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures as the exigency of the case and the law thereupon may require and authorize, according to the nature and quality of their offences. And this was and is true, public, and notorious, and so much you, the said *George Watkin Marsh*, do know, or have heard, and in your conscience believe to be true, and we article and object to you of any other time, place, person, or thing, or every thing in this and the subsequent articles contained, jointly and severally.

“15th. Also we article and object to you, the said *George Watkin Marsh*, that in the years 1819, 1820, and 1821, or

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in three, two, or one of such years, you carried on the trade or business of a maltster in a malthouse in the town of Church Stretton, in the county of Salop; within the diocese of Hereford; and that you thereby unlawfully gave yourself up to loose and servile labour. And that this was and is true, public, and notorious, and we article and object to you as before.

“ 16th. And we article and object to you, the said *George Walkin Marsh*, that at the time you carried on the trade or business of a maltster, as stated in the next preceding article, you also carried on and exercised the trade or business of a flannel manufacturer, at a place called Church Stretton Carding-mill, in the parish of Church Stretton, in the county of Salop, and within the diocese of Hereford, and that you also bought and sold wool of profit and gain, and thereby exercised yourself in the course of your life as a layman. And this was and is,” &c.

The 17th article objected, that the defendant had occupied and tilled a farm of 200 acres and upwards, without the leave of the bishop.

On these, as well as the other twenty-seven articles, the Consistory Court pronounced this sentence:—“ We do pronounce, decree, and declare, that the said articles, heads, positions, and interrogatories, given in and admitted in the said cause as aforesaid, are for the most part sufficiently proved and substantiated.” It was suggested, on the part of the defendant, that many articles contained in the libel were cognizable only in the courts of common law, and not in the ecclesiastical courts; but that the sentence of the Consistory Court did not shew that it was confined to those articles which were under ecclesiastical jurisdiction, but that it appeared to take cognizance of the whole. It was sworn by the prosecutor’s proctor, however, that the defendant had frequently attended the Consistory Court during the pendency of the suit, and was aware of what the articles contained in the libel objected. It was also

sworn, that those articles had been admitted, with the consent of the defendant's proctor, at a Consistory Court of Hereford, and that such consent was entered in the act book of the Court.

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Maule and *Cleasby* now contended, that there were no grounds for issuing a prohibition in the present case. Here, the ecclesiastical court had not proceeded for the purpose of punishing the defendant, for offences on which temporal punishment might be inflicted, but with a view to deprive the clerk of his benefice. No objection therefore existed to the ecclesiastical court proceeding for that purpose. A clerk, if guilty of felony, could only be punished in the temporal courts by indictment, although the ecclesiastical courts proceeded against them for the purpose of deprivation, in consequence of their temporal offence. They cited *Free v. Burgoyne* (a), *Slader v. Smallbrooke* (b), *Townsend v. Thorpe* (c). Here, a sentence had been pronounced,—it was necessary that the party seeking to obtain prohibition should shew, with perfect clearness, that the jurisdiction of the ecclesiastical court did not extend to the case in question. This was decided in *Carslake v. Mapledoram* (d).

R. V. Richards, in support of the rule, contended, that from the vague manner in which the sentence was drawn up, it was quite consistent, that the common law charges contained in the libel were alone proved. It was therefore clear, if that were the case, that the prohibition ought to go. He cited *Offley v. Whitehall* (e), *Leman v. Goulty* (f).

LORD DENMAN, C. J.—Supposing, for a moment, the articles as to carrying on trade contained charges cognisable

(a) 5 B. & C. 400.

(b) 1 Lev. 138.

(c) 2 Lord Ray. 1507.

(d) 2 T. R. 473; 1 Sid. 217, S. C.

(e) Bunb. 17.

(f) 3 T. R. 3.

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only at common law,—still there are several other articles, clearly within the ecclesiastical jurisdiction, the most part of which the Court has found to be proved, and upon that finding, has proceeded to sentence. In order to get rid of the sentence of the ecclesiastical court, it is necessary to shew that the Court had no jurisdiction at all to pronounce that sentence. But nothing of the kind has been shewn here; on the contrary, it is apparent that there were certain articles only, which, if especially objected to, might perhaps have been withdrawn from the spiritual cognizance. Those articles, however, were not objected to by the defendant when the libel was exhibited, and it is quite consistent with the sentence pronounced, that no evidence whatever might have been given upon them, or even that the defendant might have been acquitted of the charges therein propounded. We see, therefore, no reason for granting a prohibition.

PATTESON, J.—It is laid down in several cases, and is not denied in the argument, that prohibition may go after sentence if there is a clear want of jurisdiction. Assuming for a moment that some of the articles in question are not within the jurisdiction of the ecclesiastical court, and that a suggestion to that effect had been made to this Court before sentence, prohibition even then would not have gone to remove the whole suit, but only those articles which charge matters cognizable by the temporal courts. But, after sentence, the onus of shewing the ecclesiastical court has proceeded on that part of the libel containing common law charges, lies on the party applying for the prohibition. There is nothing to shew here, that the sentence did so proceed; but the ground of the application is, the uncertainty as to which of the articles the Court found to be proved before them. That is not sufficient; it should be made to appear clearly, that the sentence of

the Court was founded on that part of the libel without their jurisdiction.

COLERIDGE, J., concurred (*a*).

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Rule discharged, with costs.

(*a*) *Williams, J.*, had left the Court.

SYMS *v.* CHAPLIN and Others.

(*Before the Four Judges.*)

BOMPAS, Serjt., moved for a rule to shew cause why the verdict found for the plaintiff in this case should not be set aside, and a nonsuit entered. It was an action against the defendants as carriers for not duly delivering a parcel. The declaration stated that before, &c., a fiat in bankruptcy had issued against the plaintiff, and that he was declared bankrupt, underwent his final examination, and got his certificate, signed by the due number of creditors by the statute in such case made and provided; and caused and procured the same to be signed and sealed by the major part of the commissioners under the said fiat, ready to be transmitted to London for the purpose of having the same duly allowed. And the plaintiff being possessed of the said certificate of conformity, so signed by the said creditors, and signed and sealed by the said commissioners as aforesaid, the same being of great value, caused the same certificate to be delivered unto the defendants, (they, the defendants, being common carriers of goods and merchandize for hire, in and by a certain coach from Melksham to London), to be taken care of, and safely and securely carried and conveyed by defendants, as such carriers as aforesaid, in and by the said coach from Melksham to London aforesaid; and there, to wit, at London aforesaid, to be safely and securely delivered by the de-

In an action against a carrier for the loss of a parcel of more than 10*l.* value, if the defendant wishes to avail himself of the want of notice of value, under the 11 Geo. 4 & 1 Will. 4, c. 68, he must plead it specially.

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fendants for the plaintiff. And in consideration thereof, and of certain reward, &c., they undertook to the plaintiff to take care of the certificate, and to convey the same in and by the said coach from Melksham aforesaid to London aforesaid, and there, to wit, at London aforesaid, safely and securely to deliver the same for plaintiff, concluding with a breach of the promise.

The defendants pleaded—first, Non assumpsit; second, that the plaintiff did not deliver the certificate to the defendants modo et formâ; and third, the following special plea: that the certificate was delivered by plaintiff for the purpose of being carried and conveyed as in the said declaration mentioned, after the passing of 1 Will. 4, c. 68, and that the certificate was and is a certain writing within the meaning of the said act, and that the value thereof exceeded the sum of 10*l.*; and that the certificate was not delivered at any office, warehouse, or receiving house of the defendants, as such common carriers as aforesaid, but that the same was delivered to and received by a certain servant of the defendants in that behalf; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of the defendants as aforesaid, declare the value and nature thereof; nor did the plaintiff then, or at any other time, pay to the defendants, nor to their said servant who so received the certificate as aforesaid, nor to any other person or persons on behalf of the defendants, any increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever; nor did the defendants, or any or either of them, nor did the said servant who so received the said certificate as aforesaid, nor any other person on behalf of the defendants, then or at any other time, accept any engagement to pay the same.

Replication to the first and second pleas, taking issue; and to the third, *de injuriâ*.

At the trial it appeared, that the parcel in question was worth considerably more than 10*l.*, and it was not shewn that the plaintiff had given notice of that fact, and, therefore, it was contended, that the plaintiff could not recover, in consequence of the provisions of 11 Geo. 4 & 1 Will. 4, c. 68, by which it was provided, that "no mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property, where the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the offices, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." The case of *Owen v. Burnett* (a) was cited to shew, that the plaintiff could, in no case, recover the value of the article, when above 10*l.*, unless notice was expressly given to the carrier of the value. The learned Judge reserved the point, and the plaintiff had a verdict for 20*l.* His lordship, at the same time, gave the defendants leave to set aside this verdict, and enter a nonsuit. The question now was, whether the objection to the want of notice was available to the defendants, on the present state of the pleadings.

Cur. adv. vult.

(a) 2 Cr. & Mee. 353.

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Lord DENMAN, C. J., delivered the judgment of the Court.—The question in this case is, whether, since the passing of the Carrier's Act, the plaintiff is entitled to recover from the defendants the value of a parcel, worth more than 10%, lost by them as carriers, but of which the plaintiff had not declared the value. The declaration stated, that the plaintiff delivered to the defendants, as carriers, the parcel in question at Melksham, to be carried by them in their coach from Melksham to London, and to be there delivered; and then avers, that, in consequence of their non-delivery, the plaintiff had incurred damage of 60%. The second plea traverses, modo et formâ, the delivery at Melksham. We think, on the evidence under that plea, the plaintiff entitled to retain his verdict, as the jury have found that the defendants did receive that parcel at Melksham for the purposes mentioned; which might have been consistent with the fact of notice being given. But it is objected, on the authority of *Owen v. Burnett* (a), that the plaintiff cannot recover for any article above the value of 10%, unless he has given express notice of the nature and value of the article; and that notice, therefore, is a condition precedent to bringing the action. That case, however, was decided before the new rules, and we think that, now, such a defence must be specially pleaded.

Rule refused.

(a) 2 C. & M. 353.

LILLIE v. PRICE.

(Before the Four Judges.)

In an action for libel, it is not necessary to plead specially that the alleged libel was a privileged communication between attorney and client; but that defence is available under the plea of *not guilty*.

SIR W. W. FOLLETT moved for a rule to shew cause why the verdict found for the defendant in this case

should not be set aside, and a new trial had, on the ground of misdirection. It was an action for a libel, and the defendant only pleaded one plea, that of not guilty. The cause came on to be tried before Lord *Denman*, C. J., and it then appeared from the evidence, that the alleged libel on which the action was founded, was contained in a letter, in which were several strong reflections by the defendant on the plaintiff. It also appeared, that a third party was negotiating with the plaintiff; for the sale of certain property belonging to him. For his own guidance, the third party applied to the defendant, who was an attorney, and had acted for him in that capacity, down to the time of the communication, for information with respect to the plaintiff. The defendant accordingly wrote the letter in question, and in it warned his friend not to have any dealings with the plaintiff. At the trial it was contended, that the letter, under the circumstances, must be considered as a privileged communication. The Chief Justice was of opinion that it was such a communication, and having directed the jury accordingly, they found in favour of the defendant. This direction of the learned Judge, it was submitted, was wrong. If the defendant had intended to raise the objection, that, what would otherwise have been a libel, only amounted to a privileged communication, that ought to have been done by plea specially directed to it, and raising the objection; but it was not available under the plea of not guilty. The words of the division, title *Case*, in pleadings in particular actions (a), were, "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement;" and in the instances given, "in an action of slander of the plaintiff in his office, profession, or trade, the

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(a) Ante, Vol. 2, p. 325.

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plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them *maliciously* and in the sense imputed, and with reference to the plaintiff's office or trade." It was, therefore, to be considered, whether not speaking the words maliciously was the same as speaking them under such circumstances as justified the publication. This, however, could not be the case, as, whether the occasion was such as to warrant the speaking of the words, involved a question of law, which ought properly to be referred to the Court and not to a jury. In *Stancliffe v. Hardwick* (a), the Court of Exchequer held, in an action of trover, that if the defendant sought to dispute the plaintiff's sole right of property in the subject matter of the action, that defence ought to be specially pleaded by way of confession and avoidance. So, in *Barnett v. Glossop* (b), where an action was brought for a copyright, bargained and sold by the plaintiff to the defendant, the Court of Common Pleas held, that the defendant was not at liberty, under the plea of non assumpsit, to take the objection that the agreement was not in writing, pursuant to 8 Ann. c. 19; but held that it was necessary that the statute should have been specially pleaded. The principal object of the new rules was to prevent surprise on either party, and therefore, this mode of proceeding was clearly a violation of that object, as the plea did not deny that which was the ground of action, and then the defendant afterwards sought to avail himself by way of defence of something else.

Cur. adv. vult.

Lord DENMAN, C. J.—We have consulted the other Judges upon the point in this case, whether the defence made by the defendant in this action ought not to have been pleaded specially; and we are all of opinion, that it is a defence not required to be specially pleaded.

Rule refused.

(a) Ante, Vol. 3, p. 762.

(b) Ante, Vol. 3, p. 625.

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REX v. JOWL.

(Before the Four Judges.)

WIGHTMAN moved for a rule to shew cause, why a writ of certiorari should not issue for the purpose of removing an indictment for obstructing a highway from the quarter sessions for the county of Stafford into this Court. The affidavit on which he moved, stated, that the highway which was the subject of the indictment had not been used by the public for a period of between twenty and thirty years. The defendant against whom the indictment had been preferred, had built a brewery on a part of that which was alleged to be a highway. The question, therefore, which would really be tried by this indictment, was an action of ejectment. The affidavit then stated generally, that several difficult questions of law were likely to arise on the trial, but without pointing out any specific legal difficulty. This, it was submitted, contained a sufficient allegation to entitle the applicant to remove the indictment. Various questions of law frequently arose, as to whether a road was a public highway or not. The case of *Rex v. Marchioness of Downshire* (a) shewed this to be fact.

In order to remove an indictment for obstructing a highway from the Quarter Sessions, it is not sufficient to state generally that difficulties in point of law may arise on the trial, but it is necessary to point out some specific difficulty.

PATTESON, J.—The affidavit should point out some specific difficulty in point of law, as likely to arise on the trial of the indictment. The mere general statement, that such difficulties may arise, is not sufficient.

WILLIAMS, J., and COLERIDGE, J., concurred (b).

Rule refused.

(a) 5 N. & M. 662.

(b) Lord Denman, C. J., was absent.

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One day's notice of justification of the same bail at chambers is sufficient.

WILSON v. HAWKINS.

HINDMARCH moved for a rule nisi to set aside the rule for the allowance of bail in this action, and also to rescind an order made by Mr. Justice *Littledale* for setting aside the assignment of the bail bond and all proceedings thereon. It appeared, that the defendant had been arrested on the 15th November, and the plaintiff had declared de bene esse. Notice of bail was given, and also notice of exception, requiring the bail to justify at chambers. On Friday, the 25th November, at half-past six o'clock, P. M., a notice was served that the bail would justify at chambers on Monday, the 28th November. The defendant's attorney attended at the Judge's chambers with the bail, in pursuance of his notice, but the plaintiff, thinking that the notice was insufficient, according to the rules of 1 Reg. Gen. H. T. 2 Will. 4, s. 16 (a), treated it as a nullity, and did not attend. The rule for the allowance of the bail was therefore obtained.

The plaintiff, notwithstanding the rule for the allowance of the bail, (which he thought, on account of the insufficiency of the notice, to be also a nullity), took an assignment of the bail bond, and commenced an action upon it. The defendant then took out a summons to shew cause before Mr. Justice *Littledale*, at chambers, who made an order, setting aside the proceedings upon the bail bond.

Hindmarch now moved to set aside the rule for the allowance of bail, and also the Judge's order for setting aside the subsequent proceedings against the bail, and cited the case of *Staines v. Stoneham* (b).

LITTLEDALE, J., was of opinion, that that case was not in point, because it might have been added bail; but search

(a) Ante, Vol. 1, p. 185.

(b) Ante, Vol. 4, p. 678.

had since been made in that case, and the bail were found to be original and not added.

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Hindmarch.—The practice of this Court, before the rules of H. T., 1832, only required one day's notice of justification, (exclusive of a Sunday), when the justification was *in Court* (a), but there never was any practice respecting justification *out of Court* previous to these rules. Those rules recite (b) that it is expedient that the practice of the Courts should as far as possible be rendered uniform, and then order that the practice to be observed in the Courts, with respect to the matters thereafter mentioned, should be as therein observed. Section 16 of the first of those rules provided, that it shall be sufficient in all cases if notice of justification of bail be given two days before the time of justification. And the following section, No. 17, of the same rule, ordered, that if bail are excepted to in vacation, and the notice of exception requires them to justify before a Judge, the bail shall justify within four days from the time of such notice. It had been a prevailing opinion in the profession, that these rules made a two days' notice of justification necessary even in Court, and that, as there had been no previous practice of the Court respecting justification at chambers, notice of such a justification was to be governed entirely by the rules of H. T. 2 Will. 4. (Tidd's Supplement, 25; 3 Chit. Gen. Prac. 385). There was not two clear days' notice in this case, and if two days' notice were necessary, the defendant was irregular, and, on the authority of *Staines v. Stoneham*, the plaintiff was justified in treating the notice and the rule for the allowance of bail as nullities.

PATTESON, J., said he would consult *Littledale, J.*, before he gave his decision.

Cur. adv. vult.

(a) Two days' notice is required in the Common Pleas and Ex-
chequer. (b) Ante, Vol. 1, p. 183.

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PATTERSON, J.—I have consulted Mr. Justice *Littledale*, and we are both of opinion that notice of justification must be governed by the practice of the Court, whether the justification takes place in Court or at chambers; and one day's notice of justification was therefore sufficient.

Rule refused.

BOOTH v. HOWARD.

If to a declaration in the ordinary form, in indebitatus assumpsit, with particulars containing various causes of action, the defendant pleads payment into court, he is not precluded by his plea, from contesting his liability in respect of any items beyond the amount paid into court, as the particulars are not to be considered as part of the declaration.

ADDISON shewed cause against a rule obtained by *James* for setting aside the verdict found for the defendant, and for a new trial. It was an action of assumpsit, for work and labour bestowed by the plaintiff in endeavouring to let certain houses belonging to the defendant. In the particulars delivered by the plaintiff were contained one set of items to the amount of 7*l.* 18*s.* for endeavouring to let certain premises in the Borough, and another set amounting to 8*l.* 9*s.* 6*d.* in respect of certain other premises. The defendant, in the ordinary form (a), given by 17 Reg. Gen. H. T. 4 Will. 4, pleaded the payment of 5*l.* into court, and "that the plaintiff had not sustained damages to a greater amount than the said sum, in respect of the cause of action in the declaration mentioned." On this plea issue was joined, and the case came down for trial before the secondary. The counsel for the defendant proposed to shew that the second class of items contained in the plaintiff's particulars was in respect of business done for the defendant's mother, and not for herself. On the part of the plaintiff it was objected, that evidence with this view could not be given, as all the causes of action alleged in the plaintiff's declaration had, to a certain extent, been admitted, and therefore the only question was as to the amount of charges which the plaintiff was entitled to

(a) Ante, Vol. 2, p. 320.

make. This objection was overruled by the secondary, and the evidence having been admitted, the jury found a verdict for the defendant, they being of opinion that the plaintiff was not entitled to any sum beyond the 5*l.* paid into court. *Addison* now contended, that the only effect of the plea of payment into court was to admit a cause of action to the amount of the sum paid in, and not to admit a portion of a cause of action on each of the causes of action, which the plaintiff thought proper to allege in his declaration. Such a construction could not be put upon the plea, unless the particulars were to be considered as incorporated into the declaration. He cited *Seaton v. Benedict* (a), *Meager v. Smith* (b), and *Jones v. Reade* (c).

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James, in support of the rule, contended, that although the contract was alleged in a general form, it might be considered as a special one, as it was for letting houses only. The payment of money into court therefore operated as an admission of a contract in respect of all the items to which the declaration referred. He cited *Ravenscroft v. Wise* (d), *Lechmere v. Fletcher* (e), *Jourdain v. Johnson* (f), and *Coates v. Stevens* (g).

Cur. adv. vult.

PATTERSON, J.—This was an action of indebitatus assumpsit, for work and labour in endeavouring to let certain premises of the defendant. The particulars of demand contained charges amounting to 7*l.* 18*s.* in respect of premises called the White Hart Inn, in the Borough, also other charges amounting to 8*l.* 9*s.* 6*d.* respecting other premises in Cannon-street and King William-street. The defendant pleaded payment into court of 5*l.*, and

(a) 5 Bing. 28.

(b) 4 B. & Ad. 673.

(c) Ante, p. 216.

(d) Ante, Vol. 2, p. 676.

(e) 1 Cr. & Mee. 623.

(f) Ante, Vol. 4, p. 534.

(g) Ante, Vol. 3, p. 784.

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that the plaintiff had sustained no damages beyond that sum in respect of the causes of action mentioned in the declaration.

At the trial, the plaintiff established a demand in respect of the premises in the Borough, and the jury thought the 5*l.* paid into court sufficient to satisfy that demand. The plaintiff also made out a *prima facie* case as to the other premises. The defendant contended, that she was at liberty to shew, as to those other premises, that they belonged to another person, by whom the plaintiff was employed, and that she was not liable in respect of them. The plaintiff contended that the defendant by her plea admitted her liability as to every item in the particular, and put herself entirely on the question how much was due on each item.

The case has been argued here upon the analogy of the old practice of payment into court under a rule, but it appears to me that such analogy will not hold, because, according to that practice, there was always a plea of the general issue, which directly put in issue the liability of the defendant ultra the money paid into court. It has also been argued, upon the language of the plea of payment into court, both in *indebitatus assumpsit* and in *debt*, that the plea puts in issue the amount of the demand only, admitting the liability of the defendant in all respects.

I am of opinion that this is so, and that all the causes of action stated in the declaration are admitted by this plea. Still, the question remains, what are the causes of action stated in the declaration? Now the declaration, being quite general in its form, may embrace many causes of action, or may be confined to one; and the plea, having reference to so general a form, cannot be fairly taken to admit more than that the defendant is indebted on some cause of action coming within the description in the declaration to the extent of the money paid into court.

Even upon a judgment by default, nothing more would be admitted. But, if the particulars of demand be considered as incorporated in the declaration, all the contracts stated in those particulars will undoubtedly be admitted by the plea, and if the liability of the defendant on any of them be intended to be disputed, some other plea must be resorted to. Both the sense and language of this plea would, in such a case, confine the question in dispute to the amount only which the plaintiff is entitled to recover upon admitted contracts.

I have had considerable doubt upon the point, but have at length arrived at the conclusion that particulars of demand are not to be considered as incorporated with the declaration. They are intended for the benefit and information of the defendant, and although the defendant might in this case have pleaded as to 8*l.* 9*s.* 6*d.* the general issue, and as to the residue of the demand payment of 5*l.* into court, and would I think have taken a better course if she had so pleaded, yet I am not prepared to say that she was bound to do so. So far as the pleadings are concerned, I think that she was not obliged to look out of the record, and as the declaration is in its language general, she was at liberty to treat it as embracing only that contract which she chose to admit, though she could not thereby preclude the plaintiff from establishing any other contracts, of the existence of which, in the whole of the evidence, the jury might be satisfied, and which would range themselves under the general words of the declaration. I have not been able to find any direct authority on the point, but the judgment of *Littledale, J.*, in *Meager v. Smith (a)*, is strong to shew, that the particulars are not of necessity to be taken as part of the declaration, and the practice in cases of judgment by default points the same way.

I should add, that even if the plea did admit that some-

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(a) 4 B. & Ad. 673.

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thing was due on each item in the particulars, still, as the plaintiff must make out by evidence how much was due, and the defendant might adduce evidence, in answer, the jury might be satisfied by such evidence, and give only nominal damages; but if they were bound to give even 1s., the verdict would have been for the plaintiff, and it is therefore necessary to determine the principal question.

Upon the whole I am of opinion, that the evidence on the part of the defendant was properly received, and that the present rule for a new trial must be discharged.

Rule discharged.

111. See Smith v. Green. 5 D. & L. 520.

HUNT v. HUNT.

If a cause is referred to an arbitrator, the costs to abide the legal event, it is an excess of authority to award a stet processus.

MARTIN shewed cause against a rule nisi obtained by *Smirke* for setting aside an award on various grounds.

Smirke supported the rule.

Cur. adv. vult.

112. Where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award.

PATTESON, J.—In this case several objections were taken to the award; but as my judgment turns on one only, I do not think it necessary to notice the others.

Three causes were referred by order of nisi prius, a verdict being taken in one; and it was directed that the costs of the respective causes should abide the event and determination of the said award upon each respectively.

In the first action, Jemima Hunt was plaintiff, and Thomas Hunt defendant. The declaration contained a count on a promissory note, and the money counts. The defendant pleaded as to all but the first count and 51*l.* 13*s.* 9½*d.*, part of the other counts, non assumpsit; 2nd, as to all but 51*l.* 13*s.* 9½*d.*, a set-off; 3d, as to 51*l.* 13*s.* 9½*d.*, the nonjoinder of Batcheldor Hunt as a defendant. Issues were taken.

In the second action, Martha Hunt was plaintiff, and Thomas Hunt defendant. The action was on a promissory note and money counts. Pleas, set-off and non-assumpsit to the latter counts, and issues taken.

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In the third action Jemima and Martha Hunt were plaintiffs, and Thomas and Batcheldor Hunt were defendants. The declaration contained the money counts only. Thomas Hunt pleaded the general issue, and Batcheldor Hunt suffered judgment by default.

The arbitrator has awarded in each cause, that the action shall cease and be no further prosecuted, and has found in the first, 84*l.* 15*s.* to be due to Jemima Hunt.

In the second, 229*l.* 13*s.* 6*d.* to be due to Martha Hunt.

In the third, which he describes as an action by Jemima and Martha Hunt against Thomas Hunt, 16*l.* 19*s.* 10*d.* to be due from Thomas Hunt to Jemima and Martha, saying nothing about Batcheldor Hunt, though he directly afterwards awards that the action by Jemima and Martha against Thomas and Batcheldor Hunt shall cease, and be no further prosecuted.

The objection taken is, that the arbitrator has not adjudicated on each specific issue, and that he was bound to do so, because the costs are to abide the event. Again, that he has awarded a stet processus in each action, which is in effect exercising a discretion as to the costs, because it prevents either party from having them, there being no legal event of the award, whereas they were to abide the legal event. It was assumed, that the arbitrator need not in terms adjudicate on each issue—that it is sufficient if he so express himself that it is plain how he means the verdict or decision to be. I agree to that answer, which is certainly the rule as laid down in several cases, and have endeavoured to find from the language of this award, whether it was the intention of the arbitrator, that a verdict should be entered for the plaintiff in each case, to the amount of the sum he has found to be due. I am not,

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however, fully satisfied that such was his intention, nor can I tell how he meant that his award of a stet processus should operate, whether to prevent any verdicts being entered, or any judgments on such verdicts. In either way, the award of a stet processus is beyond his authority, because it either prevents any legal event of his award as to the actions, or prevents the legal events, if the verdicts can be so called, from having their legal operation. An arbitrator cannot, in any case, award a stet processus, except when he has power over the costs: *In re Leeming* (a), *Norris v. Daniel* (b), *Dibben v. Marquis of Anglesea* (c), which last case was really decided on the ground of issues becoming immaterial, which was not the case here. But I thought at one time that this award of a stet processus prejudiced the plaintiffs only, and that they might waive the prejudice. However, on looking fully to the pleadings, I find that not to be so. The defendant, Thomas Hunt, was entitled to have his costs if his set-off was proved, or if his plea in abatement was proved; and still more, in the joint action against him and Batcheldor Hunt, if the money found to be due in it was due from him, Thomas, only, he was entitled to a verdict for the misjoinder of Batcheldor, and to all the costs of that action. Now, the arbitrator has omitted Batcheldor's name in finding the sum due to Jemima and Martha jointly, and it is impossible for me to supply the name, or to tell at all what is the legal event, as to that action.

It may be, therefore, that the defendant is really prejudiced by this award; at any rate it is so uncertain, whether, if the arbitrator had specifically adjudicated on each issue, he would not have found some one or more for the defendant, that I cannot say that the prejudice is

(a) 5 B. & Ad. 403.

(b) 10 Bing. 507.

(c) 10 Bing. 568; 2 Cr. & Mee. 722.

all on the plaintiff's side, and may be waived. On these grounds, viz. that the arbitrator has not either specifically or by necessary implication adjudicated on each issue, and that he has exceeded his authority in awarding a stet processus in each case, having no power over the costs, I feel myself compelled to say that this award is bad, and that the rule for setting it aside must be made absolute.

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Rule absolute.

COURT OF EXCHEQUER.

Hilary Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

RULE OF COURT,

EXCHEQUER OF PLEAS, HILARY TERM, 7 WILL. IV.

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IT is ordered, that from and after the last day of the present term, no rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff or bail, or any officer of the sheriff, be grounded on an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

“ ABINGER,
 “ W. BOLLAND,
 “ J. PARKE,
 “ J. GURNEY.”

1837.

LEWIS v. KER.

ASSUMPSIT by indorsee against drawer of a bill of exchange. The defendant in substance pleaded, that he was an attorney of the Court of King's Bench, and that he and the other attornies of that Court ought, by ancient and laudable custom, from time immemorial used and approved of according to the laws and customs of this realm, and the liberties and privileges of the said Court, to be free and exempt from being compelled against their will to answer any plea, or plead in any action personal, before any other Judge whomsoever, except before the Justices of the King's Bench. To this plea there was a demurrer, in support of which,

The Uniformity of Process Act has not abolished the privilege of an attorney to be sued in the court to which he belongs.

Platt contended the 2 Will. 4, c. 39, s. 1, which had abolished the old form of process against attornies, and required them to be sued by summons as other persons, had in effect taken away their privilege.

Barstow, in support of the plea, was stopped by the Court.

Per Curiam.—The attorney's privilege remains, notwithstanding the 2 Will. 4, c. 39, s. 1, which has only given a new form of process in lieu of the proceedings by bill.

Judgment for defendant.

DOE dem. BARLES and Others v. ROE.

THE declaration contained demises by different persons, some joint, and others several. The Master had refused

Where the declaration in ejectment contains both joint

and several demises, it is sufficient to entitle the affidavit on motion for judgment as being on the several demises of all the lessors of the plaintiff, without noticing which are joint and which several.

1837.

DOE
d.
BARLES
v.
ROE.

to draw up the rule, the affidavit being entitled on the several demises of all the lessors of the plaintiff. He conceived that, as some of the demises were joint, and others several, the title of the demises ought to correspond with the affidavit.

Cowling now moved for judgment, and referred to *Doe d. Jenks and Others v. Roe (a)*, as an authority that the title of the affidavit was sufficient.

Per Curiam.—If the names of all the lessors of the plaintiff are stated in the title of the affidavit, that is sufficient.

Rule absolute.

(a) Ante, Vol. 2, p. 55.

SPYER, Assignee v. CARPER. The Same v. HENSCHER.

Time was, in the first instance, given to the defendant, without the consent of the bail; one of the bail afterwards applied to the plaintiff for "further time."—*Held*, that this application amounted to a waiver.

MANSEL moved to enter an exoneretur on the bail piece, time having been given to the principal without the consent of the bail. It appeared that time had been given to the defendant in the first instance, from the 29th of November to the 5th of December, without the consent of the bail; but subsequently a request for "further time," from the 5th of December to the 12th, was signed by one of the bail, and addressed to the plaintiff.

Hoggins shewed cause, and contended that the application "for further time," was a waiver of the original irregularity.

Per Curiam.—If the bail knew of the first time having been given, the subsequent request amounts to a waiver; and the application "for further time" is evidence that they were aware of time having been before given.

Rule refused (a).

(a) See *Howard v. Bradberry*, ante, Vol. 3, p. 92.

1837.

GILBERT and Another v. POPE.

MANSEL moved to discharge a prisoner out of custody, under the 48 Geo. 3, c. 123, for having been in custody more than twelve months for a debt under 20*l*.

A prisoner within the rules is not entitled to his discharge under the 48 Geo. 3, c. 123.

Barstow shewed cause, upon affidavit that defendant was living within the rules of the prison, and contended that this was not the custody contemplated by the act. He referred to *Sumption v. Monzani* (a).

ALDERSON, B.—Upon the authority of that case, I am of opinion the prisoner is not entitled to his discharge.

(a) K. B., Easter Term, 1836; not reported.

 POOLE's Bail.

CLARKSON moved to justify bail. It was a two days' notice, accompanied by an affidavit in the form given by the 8th rule of T. T., 1 Will. 4, but the affidavit did not state the defendant was a prisoner, nor did it shew that he was in custody. For this reason, *Gurney*, B., refused to allow the bail to justify, and referred him to the Court. There were conflicting decisions on the point; *Creighton's Bail* (a), *Frith's Bail* (b), *Bullen's Bail* (c).

Where a prisoner justifies under the two days' notice, it must appear from the affidavit that he is a prisoner.

Per Curiam.—There is no inconsistency in the cases cited, since in *Frith's Bail* it appeared from the affidavit that defendant was in custody.

Bail rejected.

(a) Ante, Vol. 1, p. 609.

(b) Ante, Vol. 2, p. 229.

(c) Ante, Vol. 3, p. 422.

1837.

IVEY v. YOUNG.

Where the verdict is under 20*l.*, a certificate of the cause being fit to be tried before a superior judge may be given at any time.

THIS was an action for the non-delivery of goods, and was tried before *Alderson*, B., at the last assizes at Bristol; when a verdict was found in favour of the plaintiff for 2*l.* 13*s.* The Master having allowed the plaintiff full costs,

Butt moved to review the Master's taxation, on the ground that, as the Judge had not certified on the *postea* that the cause was proper to be tried before him, and not before a sheriff, or a judge of an inferior court, the plaintiff was only entitled to the reduced scale of costs. He referred to directions to taxing officers (*a*).

PARKE, B.—My brother *Alderson* reports that it was a fit case to be tried at the assizes. The certificate may be given at any time.

Rule refused.

(*a*) Ante, Vol. 2, p. 485.

FIELD v. FLEMMING.

Plaintiff declared on a note dated the 10th of *November*, but in the notice to admit the handwriting, described the note as bearing date the 10th of *October*. A verdict having been found for the plaintiff, the Court refused to set it aside, as it did not appear the defendant had been misled.

ASSUMPSIT by payee against maker of a promissory note, bearing date the 10th day of *November*, 1836. Plea, that the defendant did not make the note. The plaintiff had obtained a judge's order to admit the handwriting, pursuant to the rule of H. T. 4 Will. 4 (*a*), but in the notice, the note was described as a joint and several promissory note, made by the defendant, and one J. B., for the sum of 200*l.*, payable to the plaintiff on the 10th of *October*. At the trial before Lord *Abinger*, C. B., at the

(*a*) Ante, Vol. 2, p. 308.

last sittings in Middlesex, the only evidence on the part of the plaintiff was the defendant's admission of the handwriting to the document specified in the notice. It was objected by the defendant's counsel, that the admission of the note described in the notice was no evidence of the note declared upon. A verdict was found for the plaintiff, with liberty to move to enter a nonsuit.

1837.
FIELD
v.
FLEMMING.

Humfrey now moved accordingly, and urged that there was no evidence to support the plaintiff's claim. The Judge had only power to make an order for the admission of the particular document specified in the notice, and that alone the defendant had admitted.

LORD ABINGER, C. B.—The question appears to me to be this, whether or no the plaintiff is to be at liberty to shew that he has made a mistake? he is undoubtedly entitled to do so. Suppose a person who receives ten pounds should give a receipt for twenty,—would he not be at liberty to shew that he had in fact received but ten? It appeared that the promissory note was annexed to the notice. The defendant could not therefore have been misled; his intention was to admit a particular note, the original of which was annexed to the notice.

Rule refused.

—
 REX v. Sheriff of KENT, in the Case of POTTER v.
 SIMPSON.

IN this case the sheriff having been ruled to return a writ of capias, made his return in the following form: "The within-named F. Simpson *is not to be found* in my bailiwick." A rule nisi having been obtained by *Busby* for an attachment against the sheriff,

A return to a writ of capias, that the defendant is not to be found, is bad.

1837.

REX

v.
Sheriff of KENT.

Clarkson shewed cause, and contended that this was a proper return. "Not to be found," clearly meant that the defendant was never to be found. He referred to *Watson on Sheriffs*.

PARKE, B.—This is not a proper and regular return; it should be *non est inventus*,—that is, the defendant is not found in my bailiwick at any time between the teste and return of the writ.

ALDERSON, B. It is better to adhere to the technical term of *non est inventus*, which has by long usage acquired a definite meaning.

BOLLAND, B.—The return of *non est inveniendus* is not to be found in any precedent.

Rule absolute.

ROY v. BRISTOW.

The rule for striking out counts founded on the same matter of complaint should be drawn up on reading the declaration, or upon affidavit that they are identical.

The first count of a declaration stated, that E. J. was possessed of shares in a railway, and that defendant promised plaintiff that he was authorized by

E. J. to sell the shares; whereas he was not so authorized. The second count stated defendant bargained with plaintiff to sell him the said shares, and promised to transfer them within a reasonable time. *Semble*, that both counts are not allowable.

THE first count of the declaration in substance stated, that one E. J. was possessed of certain shares in the Manchester railway: that a bargain took place between the plaintiff and the defendant for the sale of the said shares at a certain price, and the defendant then promised the plaintiff that he was authorized by the said E. J. to sell the said shares: it then alleged that defendant had no authority from the said E. J., or any other person, to sell the said shares, and in consequence thereof the plaintiff lost a large sum of money. The second count stated that a contract was entered into between the plaintiff and the defendant for the sale of the said shares, at the same price, and in consideration thereof, the defendant promised

the plaintiff to transfer the shares within a reasonable time: that although plaintiff was willing to receive the shares at the said price, defendant would not transfer them, in consequence whereof plaintiff lost a large sum of money.

1837.
 —————
 ROY
 v.
 BRISTOW.

Cowling moved to strike out one or other of the counts, on the ground that they were substantially for the same cause of action.

LORD ABINGER, C. B.—The first count charges the defendant with making a false representation as agent; the second is on a cause of action against him as principal; in either situation, the plaintiff might recover under the first count.

On a subsequent day, *Crompton* shewed cause, and objected that the rule did not state that it was drawn up upon affidavit, that the counts were identical; or upon reading the declaration.

Per Curiam.—The rule must be discharged, with costs.

Rule discharged, with costs.



KEY v. MAC KYNTIRE.

IN this case, bail had been added by a judge's order. *Addison* opposed the justification, on the ground, that four days' notice had not been given, pursuant to 1 R. T. T., 1 Will. 4 (a). The first rule of T. T., 1 Will. 4, does not apply to added bail.

Cowling, in support of the bail, contended, that as the

(a) Ante, Vol. 1, p. 102.

1837.

KEY

v.

MACKYNTIRE.

present were country bail, the R. T. T. 1 Will. 4, did not apply. He cited *Hardbottle v. Clark* (a).

THE COURT, after referring to *Perry's Bail* (b), decided that the rule did not apply to a case of added bail.

(a) Ante, Vol. 4, p. 12.

(b) Ante, Vol. 1, p. 564.

FLEMMING v. CRISP.

The plaintiff's particulars were for goods sold on the 6th of January; the evidence given at the trial was of goods sold on the 28th of May. A verdict having been found for the plaintiff, the Court refused to set it aside, all other accounts between the parties having been settled.

THIS was an action for goods sold and delivered. The plaintiff by his particulars claimed 14*l.* 15*s.* 6*d.*, for goods sold and delivered to the defendant, on the 6th of January, 1836. At the trial before the under-sheriff of Middlesex, the plaintiff gave evidence of goods supplied to the defendant on the 28th of May, 1836, and it also appeared that the defendant had been in the habit of dealing with the plaintiff for the six months preceding that period, but all those goods had been paid for. No evidence was offered on the part of the defendant, and a verdict was found for the amount of the plaintiff's claim.

Humfrey moved to set aside the verdict, and for a new trial, on the ground that the plaintiff could not recover under his particular. The present case was different from *Millwood v. Walter* (a), and *Green v. Clark* (b), which were decided on the ground that the defendant could not have been misled; but here there had in fact been goods supplied to the defendant in the month of January; he was not therefore prepared to meet the demand in the month of May.

Per Curiam.—As all the previous accounts were settled, the defendant must have known what the plaintiff was

(a) 2 Taunt. 224.

(b) Ante, Vol. 2, p. 18.

going for. If the date of the particular is to be construed with such strictness, it will in most cases be compelling the plaintiff to be nonsuited.

Rule refused.

1837.
FLEMMING
v.
CRISP.

*A power to certify should in such case be inserted in the order. See *Jeffrey v. Hart* 5 D. & L. 626.*

JONES v. BOND.

Reported also 2 M. & W. 208.

THIS was an action for goods sold and delivered; and was tried before the under-sheriff of Gloucester, when a verdict was found for the plaintiff for 1*l.* 15*s.* 9*d.* The defendant applied to the under-sheriff to certify under the 43 Eliz. c. 6, but he refused, conceiving that he was not a judge or justice within the meaning of that act.

The Judge who tries a cause under a writ of trial, has no power to certify to deprive the plaintiff of costs, where the verdict is under 40*s.*

Francillon now moved for a rule to shew cause why the plaintiff should not produce the record, and why the sheriff should not certify under the statute of Eliz. He contended that the under-sheriff, being the person before whom the cause was tried, came within the terms of the 43 Eliz. c. 6. If it were not so, that act has been repealed by the 3 & 4 Will. 4, c. 42, s. 17, so far as respects all causes tried before the sheriff. This could never have been the intention of the legislature. The under-sheriff may be considered as an officer of the Court, and then the cause would in effect be tried by the superior Court.

If there is cause to suppose the action is brought for less than 40*s.*, that should be stated as an objection to the order for the writ of trial.

LORD ABINGER, C. B.—In *Wardroper v. Richardson* (a), the Court of King's Bench decided against a similar application. The sheriff is not within the meaning of the 43 Eliz. c. 6, which applies only to Judges of the superior Courts. I wish we could consider the under-sheriff as our officer, and the cause in effect tried before us.

(a) 1 A. & E. 75.

1837.

JONES
v.
BOND.

PAKKE, B.—The act only applies to the Judges at Westminster. When the 3 & 4 Will. 4, c. 42, passed, it was proposed to give the sheriff the power of certifying; but it was considered objectionable. If there was any cause to suppose the action was brought for less than 40s., that objection should have been stated before the Judge when the writ of trial was applied for, and it would have been a good reason why the cause should not be sent before the sheriff.

Rule refused.

GRAINGER v. MOORE.

Where a person is in custody of the *sheriff* on a criminal charge, it is not necessary to obtain an order of the Court for the *sheriff* to detain him in a civil suit.

THE defendant being in Horsemonger gaol, in the custody of the sheriff of Surrey, on a criminal charge, *Humfrey* moved for an order commanding the sheriff to detain the defendant on a writ of *capias* issued at the suit of the plaintiff.

LORD ABINGER, C. B.—There is no necessity for an order of that kind. If the writ is lodged with the sheriff, he is bound to detain the defendant, or he will be liable to an action. The officer informs me that there is no such rule in this Court.

Humfrey stated that it was the common practice to obtain such orders, which were frequent at chambers, but he understood that in term the application should be made in Court.

LORD ABINGER, C. B.—I have sent to the Court of King's Bench, and they report that the rule applies to persons in the custody of the marshal. That is quite a different case from where the defendant is in the custody of the sheriff himself. I cannot conceive upon what principle the sheriff should have an order of the Court.

Rule refused.

1837.

BLUNDELL v. HANSOM.

ON the 9th of January the plaintiff declared, and indorsed his declaration to plead in four days, and demanded a plea. The time for pleading expired on the 13th, and at one o'clock on the 14th the plaintiff signed judgment. *R. V. Richards* having obtained a rule to set aside this judgment, on the authority of *Kemp v. Fyson* (a),

Where there has been a demand of plea at the time of declaration delivered, the plaintiff may sign judgment for want of a plea in the morning of the day after the time for pleading expires.

Jervis shewed cause, and contended that *Kemp v. Fyson* only applied to cases where the demand of plea was made after the time for pleading expired (b). The time is reckoned one day inclusive, and the other exclusive (c); but here the defendant claimed four days and a half to plead.

R. V. Richards, in support of the rule, stated that the practice established in *Kemp v. Fyson* had been frequently acted upon in chambers.

PARKE, B.—We decided *Kemp v. Fyson* on the authority of Master Walker, who now entertains some doubt as to the accuracy of his report. I am aware the profession is dissatisfied with that decision. As the defendant has been misled by that case, the rule will be discharged without costs.

Rule discharged, without costs.

(a) Ante, Vol. 3, p. 265. (b) See R. H. 2 Will. 4, s. 66.
(c) R. H. 2 Will. 4, viii.

1837.

BESWICK *v.* THOMAS.

On a sheriff's rule under the Interpleader Act, he is not entitled to costs, notwithstanding the execution creditor fails to appear.

THIS was a sheriff's rule under the Interpleader Act (*a*). The execution creditor did not appear.

Chilton, for the adverse claimant, submitted that he was entitled to costs.

Butt, for the sheriff, also submitted, that as he had been improperly brought to the Court, he was entitled to his costs from the execution creditor.

LORD ABINGER, C. B.—The execution creditor must pay the adverse claimant's costs, but the sheriff is not entitled to costs; he is not bound to come to the Court: he comes here for his own protection, and if he prefers so doing to taking an indemnity, that is no reason why he should have costs (*b*).

(*a*) 1 & 2 Will. 4, c. 58.

Vol. 1, p. 417; *Bryant v. Ikey*,

(*b*) See *Bowdler v. Smith*, ante, id. 428.

BEBB *v.* WALES

Semble, that a summons for further time to plead, returnable at half past 10 in the morning *during term*, is a stay of proceedings.

BARSTOW shewed cause against a rule obtained by *Humfrey*, for setting aside a judgment for irregularity. The action was brought on a bill of exchange, and the declaration was delivered on the 24th of October last. On the 29th of October, a Judge's order had been obtained for time to plead, and on the 2nd of November there was another order for further time. In the evening of the 7th, the day on which the time for pleading under the last order expired, a summons for further time was taken out, returnable on the following day at half past

ten o'clock, and on that day another summons was taken out, returnable at three o'clock, neither of which summonses was attended by the plaintiff's attorney. Judgment was signed on the eighth, a little after two o'clock, and at six o'clock the plea was delivered. It was submitted, that the plaintiff was quite regular in signing judgment, inasmuch as the summons returnable at half past ten o'clock was a nullity.

1837.

BEER
v.
WALES.

Humfrey, in support of the rule.—It is expressly sworn, that the first summons was served on a clerk of the plaintiff's attorney, who accepted it. [*Parke*, B.—If returnable at an hour when no Judge is attending, it means nothing, and that is your case. *Alderson*, B.—If returnable at ten o'clock it must be returnable at Westminster Hall.] It is treating a Judge's order with disrespect, to sign judgment after the summons has been regularly served.

PARKE, B.—It had better be referred to the Master to report whether or no the summons has been bonâ fide taken out, and if it had, the rule should be absolute, without costs; but if not, discharged with costs.

THE COURT, on a subsequent day, made the rule absolute, without costs (a).

(a) See *Byles v. Walter*, ante, p. 232.

LYNDHURST v. POUND.

A RULE having been obtained by *Humfrey* for setting aside a special demurrer, on the ground that the points for argument were not stated in the margin, as required by the second rule of H. T. 4 Will. 4 (a),

The second rule of H. T., 4 Will. 4, applies as well to special as to general demurrers.

Mansel shewed cause, and stated, that it was the general opinion, that the rule did not apply to special de-

(a) Ante, Vol. 2, p. 304.

1837.
 LYNDHURST
 v.
 POUND.

murrers. In the case of *Mabbott v. Allen*, it had been so decided at chambers, and there was also a case of *Neck v. Kent*, in February, 1836, before *Patteson, J.*, at chambers, when that learned Judge refused to entertain the objection, as it was considered the rule applied to general demurrers only.

PARKE, B.—The rule is intended to apply to all demurrers. If the demurrer be special, it is sufficient in the margin to refer to the causes specially assigned; because that informs the other side that it is not meant to insist on any ground of general demurrer.

Rule absolute.

ALLEN v. WALKER.

In an action by indorsee against indorser of a bill of exchange, a plea that defendant did not draw the bill is not a nullity, so as to entitle plaintiff to sign judgment.

THIS was an action by indorsee against indorser of a bill of exchange. The defendant pleaded, that he did not draw the bill. The plaintiff treated this plea as a nullity, and signed judgment. *R. V. Richards* having obtained a rule to set aside the judgment for irregularity,

Evans shewed cause, and contended, that the plea was such a nullity as to justify the plaintiff in signing judgment.

Per Curiam.—This is not a nullity, but merely an argumentative denial of the fact of indorsement. Every indorser is, in contemplation of law, a new drawer. The objection should have been taken advantage of on special demurrer.

Rule absolute.

WILSON v. PARKINS.

IN this case *Martin* had obtained a rule on the part of the defendant for setting aside the taxation of costs on the ground of irregularity. The objection was, that the plaintiff had not complied with the rule of this Court (*a*), which requires that a copy of the bill of costs, and affidavit of increase, shall be given to the opposite attorney one day previous to the time of taxing costs.

The rule of Court, which requires a copy of the bill of costs, and affidavit of increase, to be delivered to the attorney on the other side one day previous to taxation, is imperative, unless waived by the other party.

Humfrey shewed cause, and stated, that it was not the practice to deliver the bill of costs or affidavit of increase, unless it was required by the opposite party.

PARKE, B.—There is no doubt a party may waive his right, but if he does not choose to do so, the rule is imperative, and it is irregular to proceed with the taxation.

Rule absolute.

(*a*) M. T. 1 Will. 4, r. 10.

GARDEN v. CRESWELL.

A RULE having been obtained by *Erle* for an attachment against one Barnes, for not obeying a subpoena ad testificandum upon a writ of inquiry,

The affidavit, on which to obtain an attachment for not obeying a subpoena, must state that the original subpoena was shewn at the time of serving the copy.

Barstow shewed cause, and objected that the affidavit, on which the rule was obtained, did not state that, at the time of serving the copy of the subpoena, the original was shewn. In support of the objection, he referred to *Wadsworth v. Marshall* (*b*), *Rex v. Wood* (*c*), and also sub-

(*b*) 1 C. & M. 87.

(*c*) Ante, Vol. 1, p. 509.

1837.

GARDEN

v.

CRESWELL.

mitted, that he was entitled to costs, on the authority of *Wilton v. Chambers (a)*.

Per Curiam.—The rule must be discharged, with costs.

Rule accordingly.

(a) 5 Nev. & M. 432.

ATTWILL v. BAKER.

An affidavit, on which a rule was obtained for setting aside the issue and Judge's order to try before the Secondary, omitted to state that there had been any order; but the rule was drawn up on reading the order:—*Held* sufficient.

Where the issue was not according to the form given by R. H. T. 4 Will. 4, No. 4, the Court gave the plaintiff leave to amend, on payment of costs.

THIS was an action for a sum under 20*l.*, and a judge's order had been obtained to try the cause before the Secondary. The issue had been delivered in the form of an issue at nisi prius. A rule having been obtained by *Humfrey* to set aside the issue, the notice of trial, and the judge's order to try before the Secondary, on the ground that the issue did not follow the form given by R. H. T. 4 Will. 4, No. 4 (a),

Lumley shewed cause, and objected that it did not appear by the affidavit on which the rule was obtained, that there had been any judge's order, the affidavit merely stating that the issue and notice of trial had been delivered to the defendant's attorney.

Humfrey called the attention of the Court to the rule, which was drawn up on reading the judge's order, and contended that the Court would therefore judicially notice that there had been an order.

THE COURT decided, that as the rule was drawn up on reading the order, that was sufficient; but discharged the rule, giving the plaintiff leave to amend the issue on payment of costs.

Rule accordingly.

(a) Ante, Vol. 2, p. 329. See *Peel v. Ward*, ante, p. 169.

1837.

KEY v. MAC KYNTIRE.

CRESSWELL shewed cause in the first instance against a rule obtained by *Cowling* to stay proceedings on the bail bond on payment of costs, bail above having been put in and perfected. He objected that the affidavit upon which the application was made did not comply with the rule of M. T. 59 Geo. 3 (*a*), which required the bail to swear that the application was made at their expense, and for their only indemnity. There were conflicting decisions, as to whether the rule applied to this Court (*b*), but it appeared from the case of *Call v. Thelwell* (*c*) that it had been adopted.

An application on the part of bail to stay proceedings on the bail-bond, must now be grounded on an affidavit shewing that the application is made at their expense, and for their only indemnity.

LORD ABINGER, C. B.—There is no such rule in this Court as that referred to. It appears to me very hard, that where the decisions are at variance, the party is to be bound by the last. The rule may therefore be absolute, upon the proper affidavit being filed, and on payment of costs; but at the same time it should be understood, that this Court will for the future have a similar rule drawn up (*d*).

(*a*) 2 B. & A. 240.*Surrey*, ante, Vol. 3, p. 174.(*b*) *Bourke v. Bourne*, ante, Vol. 2, p. 250; *Rex v. Sheriff of*(*c*) Ante, Vol. 3, p. 444.(*d*) Ante, p. 446.

WIGHT v. PERRERS.

THIS was an action of assumpsit, which had been tried before the under-sheriff of Middlesex, and a verdict found for the plaintiff. A rule nisi had been obtained by *Swan* to set aside the verdict, and all subsequent proceedings, for irregularity. The principal objection was, that the

Where the date of the writ of summons was incorrectly stated in the writ of trial, the Court set aside the verdict.

1837.

WIGHT

v.

PERRERS.

date of the writ of summons was incorrectly stated in the writ of trial.

Hindmarch shewed cause. The rule nisi obtained by the defendant, only points at an irregularity in the verdict and subsequent proceedings. The defendant therefore cannot take advantage of any antecedent irregularity. The date of the declaration has been inserted in the writ of trial by mistake, instead of the date of the writ of summons, but that is only an irregularity, and does not render the writ void; and unless the writ is void, there is nothing irregular in the verdict or subsequent proceedings.

THE COURT (a) held that the objection was fatal—that the writ of trial was void; and made the rule absolute to set aside the verdict, and all proceedings thereon.

Rule absolute.

(a) Lord Abinger, C. B., Parke, Bolland, and Alderson, Bs.

CHARINGTON v. MEATHERINGHAM and Another.

A statute enacted that if an action should be brought against any person for anything done in pursuance of that act, and the plaintiff become nonsuit, the defendants should recover treble costs. The statute having been repealed after the plaintiff became nonsuit, but before the time for signing judgment:—*Held*, that the defendants were not entitled to treble costs.

THIS was an action against the defendants for irregularities committed by them in levying distresses for poor rate and highway rate. The cause was tried before Lord Abinger, C. B., at Lincoln Spring Assizes, 1836, when the plaintiff was nonsuited, under the 24 Geo. 2, c. 44, s. 8, it appearing that the defendants were acting under a justice's warrant, and that the action was not commenced within the six months limited by that act. On taxation, the Master allowed the defendants treble costs, under the 43 Eliz. c. 2, s. 19, and the 13 Geo. 3, c. 78, s. 81. A rule

was made absolute. *Held*, that the defendants were not entitled to treble costs.

was obtained last term for the Master to review his taxation, which was made absolute (a).

1837.

CHARINGTON
v.
MEATHERING-
HAM.

N. R. Clarke now moved to discharge that rule, and for the Master to review his taxation. He stated that, upon the former motion, it was supposed the 13 Geo. 3. c. 78, had been repealed at the time the nonsuit took place. It appeared, however, that though the 5 & 6 Will. 4, c. 50, which repealed the 13 Geo. 3, c. 78, received the royal assent on the 31st of August, 1835, the 119th section enacted, that it should commence and take effect from the 20th of March, 1836, which was after the day of trial. He submitted, therefore, that, as the nonsuit took place while the 13 Geo. 3, c. 78 was in force, the defendant's right to treble costs attached at that time.

Miller and *Hurlstone* shewed cause. The 81st section of 13 Geo. 3, c. 78, provides, that if the plaintiff shall be nonsuit, the defendant shall be entitled to treble costs (b).

(a) P. 314.

(b) 13 Geo. 3, c. 78, s. 81. "And be it further enacted, that if any action or suit shall be commenced against any person or persons for any thing done or acted in pursuance of this act, then, and in every such case, such action or suit shall be commenced or prosecuted within three calendar months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought within the county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in

pursuance and by the authority of this present act; and if the same shall appear to have been so done, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought or laid in any other place than as afore-mentioned, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action after the defendant or defendants shall have appeared, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant or defendants hath or have in any other cases by law."

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That can only mean he is entitled to them by the judgment of the Court. The question then is, whether the Court can give that judgment; the 13 Geo. 3, c. 78, having been repealed before the day in banc, although it was in force at the time the nonsuit took place. The right to treble costs cannot attach upon the nonsuit; which is a mere fact reported to the Court, and upon which it delivers its judgment. In *Miller's case* (a), a debtor was compelled by a creditor to give up his effects, under an insolvent act then in force. The case standing over until the next session, the compulsory clause was in the meantime repealed, and on motion for a mandamus to the justices to proceed to give the debtor his discharge, the jurisdiction having attached before the clause was repealed, the Court said, that nothing was more clear than that the jurisdiction was gone, and they observed, that even offences committed against the clause while in force, could not have been punished without a special clause to allow it. So, where a person was convicted of stealing privately in a shop goods above the value of five shillings, and the 10 & 11 Will. 3, c. 23, was in force at the time the offence was committed, but was repealed by the 1 Geo. 4, c. 117, before the trial, all the Judges were of opinion, that the prisoner could not be punished under either statute (b). The same principle has been acted upon in several cases under the bankrupt acts, and it has been held, that evidence of a trading which ceased before the 6 Geo. 4, c. 16 took effect, would not support a commission of bankrupt issued after that time: *Maggs v. Hunt* (c), *Kay v. Goodwin* (d), *Surtees v. Ellison* (e): Lord Tenterden, C. J., observing "that it has long been established, that, when an act of parliament is repealed, it must be considered (except as to transactions past and

(a) 1 W. Black. 451.

(b) *Rex v. M'Kenzie*, 1 R. & R. 429.

(c) 4 Bing. 212.

(d) 6 Bing. 582.

(e) 9 B. & C. 752.

closed) as if it had never existed." If the defendants' right to treble costs attached upon the plaintiff's non-appearance in Court, they would be equally entitled to them, if the plaintiff had died after the nonsuit and before judgment; but in such a case the Court could not give judgment: *Doubiggin v. Harrison* (a). Besides, in the present case, there would be error on the record. Since the new rules the judgment must bear date the day it is signed, and it would therefore appear, that the Court had given judgment for treble costs, according to the form of a statute which had been repealed. [*Parke*, B.—Is it necessary that judgment should be entered on the record for treble costs?] It appears to have been the practice to do so, as the form of such a judgment is given in Tidd's Appendix.

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R. N. Clarke, in support of the rule.—The defendants acquired a right to treble costs at the time of the nonsuit. The costs are given in the nature of a penalty, and as the right has once attached, the defendants ought not to be deprived of them. In *Walker v. Barnes* (b), it was held, that a bankruptcy after verdict for defendant, and before judgment, and subsequent certificate, were no bar to an execution after judgment against plaintiff for the costs of the action. There are conflicting decisions as to whether the costs of a nonsuit are provable under a commission issued before signing judgment: *Hurst v. Mead* (c), *Watts v. Hart* (d), *Brough v. Hancock* (e), *Scott v. Ambrose* (f). But, where there was a verdict for defendant in July, a commission of bankrupt against plaintiff in August, and judgment against him, and certificate under the commis-

(a) 10 B. & C. 480.

(b) 5 Taunt. 778.

(c) 5 T. R. 365.

(d) B. & P. 134.

(e) 5 M. & P. 678.

(f) 3 M. & S. 326; 2 Rose, 435.

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sion in Michaelmas term following, it was held he was liable to an execution for costs. *Bire v. Moreau (a)*.

Cur. adv. vult.

On a subsequent day Lord *Abinger*, C. B., stated, that the Court were of opinion, that they had no power to award treble costs. The judgment of nonsuit was not, in fact, pronounced until the term, which was after the act expired, and as these costs were given in the nature of a penalty, they ought not to extend the construction of the act.

Rule discharged.

(a) 4 Bing. 57; 12 Moore, 220.

POOLE v. CROMPTON.

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the bill became due he tendered plaintiff the amount of the bill, with interest:—
Held bad upon demurrer.

Semble, if the acceptor of a bill goes to the holder's residence when the bill becomes due, and cannot find him, but afterwards tenders him the money, such a plea of tender would be good.
 Per Lord *Abinger*, C. B.

ASSUMPSIT by indorsee against acceptor of a bill of exchange for 16*l.* 0*s.* 4½*d.* Plea: that after the making of the promise in the declaration mentioned, and after the said bill of exchange became due and payable, and before the commencement of this suit, to wit on, &c., the defendant was ready and willing, and then tendered and offered to pay to the plaintiff the sum of 16*l.* 0*s.* 6*d.*, being the amount of the said bill, together with interest for the same from the day when the said bill became due and payable to the day of the tender of the said sum; to receive which of the defendant the plaintiff then wholly refused: and the defendant further saith, that he hath always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay to the plaintiff the amount of the said bill of exchange, with interest as aforesaid, and he now brings into Court the

sum of 16*l.* 0*s.* 6*d.*, ready to be paid to the plaintiff, if he will accept the same.—Demurrer and joinder.

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Humfrey, in support of the demurrer, referred to *Hume v. Peploe* (a) as an authority to shew that a tender after the day of payment could not be pleaded to an action against the acceptor of a bill of exchange.

R. V. Richards in support of the plea.—As the law at present stands, the greatest inconvenience would arise if the acceptor of a bill were not permitted to plead this plea. The holder may proceed against the acceptor without making any application for payment, and if he has no mode of protecting himself by making a tender, he may always be liable for costs. [*Parke, B.*—By accepting the bill, he has bound himself to pay with or without notice, and it is his business to find out the holder and pay him.] In ancient times, no indorsement was valid without notice to the acceptor, but since the custom of notice has been discontinued, the acceptor has no means of knowing in whose hands the bill is. The question is, whether it is sufficient to plead a tender in the way it is pleaded here. *Hume v. Peploe* was decided on the authority of *Giles v. Hartis* (b) : the objection was, that the plea only averred a readiness to pay from the time of making the tender, and Lord *Ellenborough* asks, if there was any case where an averment of *touts temps prist* was not holden to be necessary in a plea of tender. The present case is different, for here it is expressly averred, that the “defendant has always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay the amount of the said bill.” *Johnson v. Clay* (c), which was

(a) 8 East, 168.

(b) 1 Lord Raymond, 254.

(c) 7 Taunt. 486; S. C. 1 J. B. Moore, 200.

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an action of covenant for rent, governs the present case; since there is the same liberty to pay rent on the day when it becomes due, as to pay a bill of exchange. In that case the Court did not entertain a doubt as to a plea of tender being good. Other authorities are collected in 1 Wms. Sand. 33 b. (n. d.)

Humfrey, in support of the demurrer, was stopped by the Court.

LORD ABINGER, C. B.—If it were now for the first time a question, whether a good plea of tender could be made in an action against the acceptor of a bill of exchange, the case of *Hume v. Peploe* is a sufficient authority against it. I am not however prepared to say, that no case could arise in which the acceptor of a bill might successfully plead a tender. Suppose he stated that when the bill became due he went to the house of the holder of the bill, for the purpose of paying it, and he was not at home, and that the acceptor afterwards found the holder and tendered the money,—would not that be a good plea? I think the technical rules of law ought not to be abused, so as to make the machinery of a court of justice the means of getting costs; though I do not see how we can relieve the defendant upon that objection. But if the acceptor of a bill goes to the holder's residence when the bill becomes due, and cannot find him, but afterwards tenders him the money, it would be unjust to say that the acceptor is to be liable to an action, and is not to be allowed to plead that tender. The present plea, however, does not go that length. It is quite consistent with this plea, that the acceptor well knew where the holder lived. Supposing, therefore, that *Hume v. Peploe* does not apply, this plea does not disclose a sufficient defence.

PARKE, B.—There seems to me no doubt that this plea

is bad. The declaration states the contract, and that the defendant promised to pay the amount of the bill according to the tenor and effect thereof, and of his said acceptance. This promise is admitted by the plea. By law it is clear an indorser has a right of action against the acceptor without giving him any notice, and that when a person accepts a negotiable bill, he, by law, obliges himself to pay it without notice. If the acceptor has put himself in a situation of hardship and difficulty, by not being able to find the holder, it is his own fault; he is bound to pay on the precise day. The meaning of a plea of tender is, that the defendant has always been ready to perform his engagement, and does perform it by tendering the amount which he is liable to pay. It is clear, from the case of *Hume v. Peploe*, that this plea is bad; it does not state that the defendant was ready upon the day when the bill became due. With respect to the case of *Johnson v. Clay*, there must be some inaccuracy in the report, or a mistake on the part of the learned Judges. It seems there to have been considered necessary, in order to defeat a tender, that the plaintiff should prove a demand subsequent to the tender. That however is not so, and upon this principle, that the party was not ready to perform his contract at the time he is stated to be ready.

BOLLAND, B., concurred.

Judgment for the plaintiff.

HILL v. ALLEN.

ASSUMPSIT for work and labour as an attorney and solicitor, for money paid, and for money due on an account stated. Pleas: *first*, non assumpsit; *secondly*, that the

he had derived no benefit from the work, and also that plaintiff advised defendant to strike a docket against one J. H., and promised to indemnify him from the expenses occasioned thereby:—*Held* bad, as amounting to the general issue.

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To an action
for work done
as an attorney
and solicitor,
defendant
pleaded that

to strike a docket
thereby:—*Held*

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sums of money in the second and third counts mentioned were monies expended by the plaintiff, and charges made by him, for and in respect of the work and labour in the first count mentioned ; and that in performing and bestowing the said work and labour, the plaintiff, as such attorney and solicitor, conducted himself so negligently, carelessly, unskilfully, and improperly, that the same became and were wholly ineffectual and useless to the defendant ; *thirdly*, that defendant is an illiterate person, wholly unacquainted with the legal requisites to entitle any person to strike a docket against another, or with the legal consequences of such a proceeding ; and the plaintiff, being an attorney learned in the law, and well knowing the premises, on &c., advised the defendant that by virtue of a certain promissory note then in his possession he was legally entitled to strike a docket against one T. H., and requested him to strike the said docket, and to authorize the plaintiff to act as the attorney of him the defendant in that behalf, and promised him, if he would strike such docket, to indemnify him from all costs, damages, and expenses occasioned thereby, and to take care that he should incur no risk or loss in any way ; that defendant, relying upon the said advice and promise of the plaintiff, did, under his advice, and by and through his agency, as the attorney of the defendant in that behalf, strike the said docket ; that the several sums of money in the declaration mentioned and therein alleged to be due from him to the plaintiff, are costs, damages, and expenses occasioned by striking the said docket.—Demurrer to the second and last pleas, assigning for cause, that they amounted to the general issue.

Lumley, in support of the demurrer, was stopped by the Court.

M' Mahon, in support of the pleas, urged that the second admitted a breach, and avoided the cause of action, by

shewing that the plaintiff had so conducted himself as not to be entitled to any remuneration. The third plea shewed that the defendant was induced to enter into this contract by the fraudulent representation of the plaintiff, and therefore this defence came within the rule of H. T. 4 Will. 4, which required such matters to be specially pleaded.

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PARKE, B.—The pleas are clearly bad. The second is a denial that the plaintiff had performed such service as would raise a promise to pay any thing; and the last is an agreement that the plaintiff is to be paid nothing for his services.

Judgment for the plaintiff.

PROBART v. PHILLIPS.

GREAVES moved for a rule to shew cause, why the defendant's attorney or agent should not deliver the *postea* to the plaintiff's attorney or agent. The declaration contained counts for work and labour, goods sold, money had and received, and money due on an account stated. The defendant pleaded—first, non-assumpsit, except as to 15*l.* 15*s.* 9*d.*, and payment of that sum into Court; secondly, as to 52*l.* 12*s.*, payment before action brought; thirdly, as to 52*l.* 12*s.*, a special agreement, alleging the plaintiff answerable for damaging the harness of the defendant; lastly, a set-off. The replication to the first plea alleged damages ultra, and the other pleas were traversed. The cause was referred to an arbitrator, who was to certify in what way the verdict should be entered. The arbitrator directed the verdict to be entered for the plaintiff upon the first issue, with damages 17*l.* 18*s.* 10*d.*; for the defendant on the second issue; upon the third issue for the defendant, as to the sum of 20*l.*, parcel of the 52*l.* 12*s.* in that plea mentioned,

If the issues found for the defendant, taken together, form an answer to the whole of the plaintiff's declaration, the defendant is entitled to the general costs of the cause, although some issues may have been found for the plaintiff, and damages assessed on them.

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 —————
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and for the plaintiff as to the residue ; upon the plea of set-off, for the defendant. Upon taxation the Master refused to give the plaintiff the costs of the cause, although a verdict was entered for him in pursuance of the certificate. In *Broadbent v. Shaw* (a), the defendant pleaded Not guilty, and also a right of way; the plaintiff joined issue on the plea of Not guilty, traversed the right of way, and new assigned. The defendants suffered judgment by default as to the new assignment, and the jury having found a verdict for the defendants on the special plea, and assessed the damages at 1s. on the new assignment, it was held the defendants were not entitled to the general costs of the trial.

Per Curiam.—The defendant's pleas taken together cover the whole of the plaintiff's demand: he is therefore entitled to the general costs.

Rule refused (b).

(a) Ante, Vol. 1, p. 336.

(b) See *Cousins v. Paddon*, ante, Vol. 4, p. 438.

JONES v. JONES.

A country attorney, admitted in the King's Bench, conducted a suit through a London agent, who was an attorney of the Exchequer. The name of the country attorney was indorsed on the writ, and in his affidavit of increase he swore he was

JERVIS had obtained a rule to set aside the taxation of the plaintiff's costs, on the ground that his attorney was not an attorney of this Court during the greater part of the progress of the suit, and had not the consent in writing of any attorney of this Court to practise in his name, as required by the 2 Geo. 2, c. 23, s. 10.

the attorney in the cause:—*Held*, that he was entitled to recover his costs.

Semle, the 2 Geo. 2, c. 23, s. 10, does not apply to the case of a country attorney practising in the name of a London agent.

R. V. Richards shewed cause.—The agent in London is an attorney of this Court; he sued out the writ, and con-

ducted all the business in the suit, and his name appears in the declaration as the attorney on the record. The plaintiff's attorney was an attorney of the Court of King's Bench, and in the progress of the suit he frequently corresponded with his London agent, which is sufficient for the Court to infer a consent by the latter to practise in his name.

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PARKE, B.—This case resembles *Goodner v. Cover* (a), which decided that an attorney not admitted in a particular court might recover his costs for business done in that court, if he conducted the proceedings in the name of a London agent, who was an attorney of the Court.

Jervis, in support of the rule.—In that case the proceedings should be in the name of the London agent; but here the plaintiff's attorney has indorsed his name on the writ, and in his affidavit of increase he swears that he acted as attorney for the plaintiff. It is evident from the case of *Latham v. Hide* (b), that an attorney cannot recover his costs for business done in a Court in which he has not been admitted, unless he has the consent in writing of an attorney of the Court to act in his name. The consent is a condition precedent to his right to recover. The cases which have arisen respecting attornies' certificates shew how strictly the Courts have construed the rules relating to attornies; *Meekin v. Whalley* (c), *Humphrys v. Harvey* (d). The 22 Geo. 2, c. 23, makes no exception in favour of country attornies who practise in the name of London agents.

LORD ABINGER, C. B.—The particulars of the case of *Latham v. Hide* do not fully appear in the report; but as far as they do, that case does not seem to me to resemble

(a) Ante, Vol. 3, p. 424.

(c) Ante, Vol. 2, p. 823.

(b) Ante, Vol. 1, p. 594.

(d) Ante, Vol. 2, p. 827.

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the present. Here, it appears that the country attorney has been acting with the consent of his London agent, and the statute does not require any formal license to be given. Besides, the London agent, who is an attorney of this Court, has transacted all the business which has been done in town. It could never have been intended that the statute should apply to a case like the present. All that *Latham v. Hide* decided was, if an attorney act in the name of another without his authority, he shall not recover his costs.

PARKE, B.—The London agent is the real attorney in the suit. It seems to me, however, that the statute does not apply to the case of a country attorney conducting a suit through his agent in town. But even if the statute did apply, there is sufficient evidence from the correspondence of a consent by the London agent to act in his name.

Rule discharged.

COURT OF COMMON PLEAS.

Hilary Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

PRINE v. BEESLY.

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ANDREWS, Serjt., opposed bail, on the ground of his being the drawer of the bill of exchange on which the defendant was sued as acceptor.

In an action against the acceptor of a bill of exchange, the *drawer* may become bail.

W. H. Watson supported the bail, and contended that as the bail had sworn himself to be worth the necessary sum after the payment of his just *debts*, he had done all that was required in order to render him a sufficient bail. The bill on which the action was brought could only constitute a *debt*, and therefore must be included in the terms of the affidavit.

Per Curiam.—In the case of *Barnesdall v. Stretton* (a), it was held that a person who is liable upon outstanding dishonoured bills not renewed, or the right of proceeding against him not suspended, cannot justify as bail. In an anonymous case (b), Mr. Justice *Taunton* rejected the *acceptor* of a dishonoured bill of exchange, who tendered himself as bail in an action against the drawer of the same bill. The former case is the only one calculated to produce any doubt on the subject. We think, however, that the mere circumstance of the person tendering himself as bail being the *drawer* of the bill in an action against the acceptor, does not render him incompetent. The bail may therefore pass.

Bail passed.

(a) 2 Chit. Rep. 79.

(b) Ante, Vol. 1, p. 183.

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After the expiration of four calendar months, from the date of a summons, a *distringas* cannot be issued in respect of the former writ.

ABBOTTS v. KELLY.

TALFOURD, Serjt., shewed cause against a rule nisi obtained by *J. Bayley*, for setting aside a writ of *distringas* on the ground that it had been sued out after the expiration of four calendar months from the day of the date of the writ of summons, contrary to the provisions of 2 Will. 4, c. 39, s. 10, (the Uniformity of Process Act), which enacted, that no writ issued by the authority of that act should be in force for more than four calendar months.

J. Bayley appeared to support the rule.

Per Curiam.—The words of the act of Parliament are positive, and therefore the writ of *distringas* must be set aside.

Rule absolute.

DUNNAGE v. KEMBLE and Others.

In trespass q. c. f., if the plaintiff obtains less damages than 40s. on issue joined on the plea of not guilty, he is not entitled to more costs than damages, without the Judge certifies under the 22 & 23 Car. 2, c. 9.

TALFOURD, Serjt., shewed cause against a rule nisi obtained by *Andrews*, Serjt., for taxing the plaintiff his costs. It was an action of trespass, and the declaration charged the defendant with having broken and entered the plaintiff's dwelling-house, broken open the doors, and seized and taken certain goods therein. The defendant pleaded—first, not guilty, and secondly, except as to breaking open the doors, that the plaintiff was tenant to the defendant of the house in question at 4s. 6d. per week; that eighty-four weeks' rent was in arrear, and that the defendant entered the outer door, being open, to distrain, and did distrain the plaintiff's goods for the rent in arrear. The plaintiff replied by taking issue on the first plea, and *de injuriâ* to the second. At the trial, the plaintiff obtained a verdict on the first plea, with one farthing damages; and the plaintiff ob-

tained a verdict on the second plea. On taxation, the prothonotary refused to allow the plaintiff his costs. The object of the present rule was to direct him to allow them. It was sought, on the other side, to take the present case out of the operation of the 22 & 23 Car. 2, c. 9, by contending that the freehold could not, on the present pleadings, come in question. From the present state of the record, however, it was not shewn that the freehold could not come in question. Although the provisions contained in the rules of H. T. 4 Will. 4, title *Trespass* (a), confined the effect of the plea of Not guilty within much narrower limits than formerly; yet, by the proviso contained in 3 & 4 Will. 4, c. 42, s. 1, and the introductory part of the rules (b), there were many cases in which the title to the freehold might still come in question, because the right to give the special matter under the plea of the general issue was reserved to all persons who had such a privilege anterior to the act of Parliament under the authority of which those rules were made. Thus, by 11 Geo. 2, c. 19, s. 21, it was provided that "in all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence." The same observation might be made with respect to actions against surveyors under highway acts, and commissioners under the Bankrupt Act. The case therefore of *Hughes v. Hughes* (c), proceeded on a wrong ground, as it assumed that the freehold could not

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(a) Ante, Vol. 2, p. 325.

(b) Ante, Vol. 2, p. 312.

(c) Ante, Vol. 4, p. 532.

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come in question on the plea of the general issue, since the introduction of the new rules of pleadings. The case of *Smith v. Edwards* (a), proceeded on the same misapprehension. Under these circumstances, the case might be considered as within the statute, since the question as to the freehold might be raised upon this record, and consequently the plaintiff, only having recovered a verdict for a sum less than 40s., he would not be allowed his costs, without a certificate from the Judge who tried the cause, that the question as to the freehold was raised.

Andrews, Serjt., and *Bompas*, Serjt., supported the rule, and contended that the case was now, by the operation of the rules of H. T. 4 Will. 4, title *Trespass*, taken out of the operation of the 22 & 23 Car. 2, c. 9, s. 136. The words of that section were, “that in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff’s declaration was chiefly in question, the plaintiff in such action, in case the jury should find the damages to be under the value of 40s., shall not recover or obtain more costs of suit than the damages so found shall amount unto.” But, in the present case, from the operation of the rule of H. T. 4 Will. 4, it was clear that no question could arise in the present state of these pleadings with respect to the freehold. The words of the rule were (b), “in actions of trespass quare clausum fregit, the plea of Not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff’s possession, or right of possession of that place, which, if

(a) Ante, Vol. 4, p. 621.

(b) Ante, Vol. 2, p. 325.

intended to be denied, must be traversed specially." This argument was supported by the decision of the Court in the case of *Hughes v. Hughes* (a), where it was held, that since the new rules, under the plea of Not guilty, in trespass quare clausum fregit, the plaintiff is entitled to full costs, though the damages recovered are less than 40s., and there is no certificate of the judge under the 22 & 23 Car. 2, c. 9. The case of *Smith v. Edwards* (b), was to the same effect.

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Cur. adv. vult.

After term, the Court gave the following direction to the prothonotary:—"The Court have considered this case, and are of opinion that the plaintiff is not entitled to costs without a certificate under the statute of Car. 2, and therefore the rule for directing the prothonotary to tax his costs must be discharged, but without costs."

Rule discharged without costs.

(a) Ante, Vol. 4, p. 532.

(b) Ante, Vol. 4, p. 621.

BETTLEY v. M'LEOD.

TALFOURD, Serjt., and *R. V. Richards*, shewed cause against a rule nisi obtained by *Platt*, for setting aside the verdict in this case, on the ground of its being against evidence. It was an action to recover from the defendant the costs of the day, which the plaintiff had been compelled to pay, in consequence of the defendant neglecting to attend the trial of a cause pursuant to his subpœna. The plaintiff, in his declaration, alleged that at the time when the writ of subpœna was served upon the defendant, he was paid "a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor and effect of the said writ of sub-

If a witness has received an adequate sum from one party for his expenses on being subpœnaed, and he consents to accept a shilling for his expenses, with his subpœna, when served by the opposite party, he will still be liable to an action by the latter, if he does not attend pursuant to the exigency of the writ.

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poena." The defendant pleaded, that when the writ of subpoena was served on him, a reasonable sum was not paid or tendered to him. The plaintiff, in his replication, joined issue on this plea. At the trial, it was proved on behalf of the plaintiff, that when the defendant, who resided at Camberwell, was served with a subpoena requiring him to attend at the sittings at Guildhall, the plaintiff's attorney tendered him a guinea for his expenses. He then stated that the defendant in the action had already served him with a subpoena, and paid him a guinea for his expenses. The attorney then asked him whether he would be satisfied by receiving a shilling. The defendant acceded to this, and received the shilling with the plaintiff's subpoena. In summing up, *Tindal*, J. C., told the jury, that if this evidence were believed they ought to find in favour of the plaintiff. The jury found a verdict for the plaintiff, and the present rule was obtained. Against the rule, it was contended that the shilling paid to the defendant, under these circumstances, must be considered as a reasonable sum for his expenses as a witness. In the case of *Benson v. Schneider* (a), the marginal note was, "If the plaintiff subpoena witnesses, and remunerate them accordingly, who have been previously subpoenaed by and received their expenses from the defendant, which circumstance they concealed from the plaintiff, the Court will allow the latter the expenses he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud." From this case it might be inferred, that if the witness were paid by one side, he was not entitled to be paid by both. Whether the statement made by the witnesses at the time of the trial, as to what occurred on the occasion of serving the subpoena, was true, was a question for the jury, on which they had pronounced their opinion.

(a) 1 B. Moore, 76.

Platt and *W. H. Watson* supported the rule, and submitted that a shilling, under such circumstances, was not a reasonable sum for the expenses of the witness; and the plaintiff could have no right to avail himself of a payment made by some other person in order to make up a reasonable sum. With respect to any supposed dispensation on the part of the defendant with receiving a proper sum for his expenses, that ought to have been alleged in the declaration.

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TINDAL, C. J.—The defendant pleaded that the plaintiff did not pay or tender to him a reasonable sum as his expenses in attending as a witness. The plaintiff replied that a reasonable sum was tendered. A witness is certainly entitled, on being served with a subpoena, to have a reasonable sum paid or tendered to him in respect of his expenses in going to the place of trial, attending there, and returning home, in order to entitle the party, on whose behalf he is served, to bring an action against him for not obeying the writ. The question here was, whether a reasonable sum was given or tendered to him on his being served. In my opinion the words “reasonable sum,” under such circumstances, do not mean all the expenses to which a witness may be subjected in going to, attending at, and coming from the place of trial, but all that he will be liable to expend after exhausting what he may have received from the opposite party. Here, the witness had received a guinea from the defendant before he was subpoenaed on the part of the plaintiff, and it was only necessary for him to go from *Camberwell* to *London*. His accepting the shilling under these circumstances, and stating that it would satisfy him, amount together to an admission that a shilling was a reasonable sum. The present rule must, therefore, be discharged.

PARK, J., and VAUGHAN, J., concurred.

Rule discharged.

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HENRY and Another v. BURBIDGE.

In an action by the indorsee against the drawer of a bill of exchange, the declaration must allege a promise to pay by the drawer.

ASSUMPSIT on a bill of exchange against the drawer. The declaration alleged that "the defendant, on the 15th of March, 1836, made his bill of exchange in writing, and directed the same to one James Pearson, and thereby required the said James Pearson to pay to the order of the defendant 29*l.* 18*s.* 10*d.* four months after the date thereof, which period has now elapsed; and the defendant then indorsed the said bill to the plaintiffs; and the said James Pearson did not pay the said bill, although the same was presented to him on the day that it became due, whereof the defendant then had notice." To this declaration the defendant demurred, on the ground that no promise to pay by the defendant was alleged.

Whitehurst supported the demurrer, and contended that the declaration was bad on special demurrer without an allegation of a promise or agreement on the part of the drawer to pay; and he cited *Mountford v. Horton* (a), and *Starkey v. Cheeseman* (b).

Martin, in support of the declaration, contended that an action against the drawer and against the acceptor of a bill of exchange were not substantially distinguishable, and in *Wegersloff v. Keene* (c), it had been held that a promise by the acceptor need not be alleged. In *Starkey v. Cheeseman*, it had been decided by Lord *Holt*, though after judgment by default, that "the drawing of the bill was an actual promise."

TINDAL, C. J.—In this action, which is against the drawer, the bill does not constitute a debt, but raises a pro-

(a) 2 N. R. 62.

(b) 4 Salk. 123.

(c) 1 Str. 214.

by implication of law to pay in case of the acceptor failing so to do. That promise, I am of opinion, ought to be alleged in the declaration. In Mr. Justice *Bayley's* Book on Bills, p. 408, he observes, with respect to the allegation of a promise to pay, that "this clause is unnecessary in an action against either the acceptor of a bill or the maker of a note, and it may be doubted whether it is essential in any other;" and Lord *Holt* observed, after judgment by default, that the drawing amounts to a promise. But neither of these dicta amounts to a decision, that if the objection is taken on special demurrer it would not be good. I am of opinion that the plaintiff in this action ought to have alleged a promise to pay by the defendant.

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PARK, J., and VAUGHAN, J., concurred.

Judgment for defendant.

HOLLIDAY v. LAWES.

ATCHERLEY, Serjt., shewed cause against a rule nisi obtained by *Wilde*, Serjt., for delivering up the bail-bond to be cancelled, on the ground of irregularity. The alleged irregularity was twofold; first, that the defendant had been arrested a second time in respect of the same cause of action, without a judge's order for that purpose. Secondly, on account of a defect in the affidavit of debt. With respect to the former objection, it had clearly been waived, as it was sworn that the defendant's attorney had undertaken to put in bail for his client. With respect to the second objection, that was equally untenable. The terms of the affidavit were, "William James Holliday, of ———, soap manufacturer, maketh oath and saith, that Thomas Lawes is justly and truly indebted to John Holliday in 119*l.* and upwards, for money paid by the said J.

An affidavit of debt need not disclose any connexion between the plaintiff and the defendant, or the means of knowledge possessed by the latter with respect to the debt.

An undertaking to put in bail waives the objection to a second arrest, for the same cause of action, without a judge's order.

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Holliday, for the use of the said Thomas Lawes, at his request." It was objected to this affidavit, that no connexion was shewn, on the face of it, between the deponent and the plaintiff in the action, from which it could be inferred that the person making the affidavit had sufficient knowledge of the plaintiff's affairs to enable him to swear to the existence of the alleged debt; nor were the means of his knowledge stated. That was not, however, necessary, if the deponent swore positively that the debt existed. He cited *Brown v. Davis* (a), *Pieters v. Luyties* (b), *Andrioni v. Morgan* (c), *Short v. Campbell* (d), and *King v. Lord Turner* (e). In the last case it was expressly held, that it is sufficient for another person to swear that the defendant is justly and truly indebted to the plaintiff in order to hold the former to bail, even though the deponent does not describe himself in the affidavit to be the agent or servant of the plaintiff.

Wilde, Serjt., in support of the rule, contended that the affidavit should disclose the means of knowledge possessed by the deponent, unless it was shewn by some writing that the debt existed or the plaintiff was resident out of England. In this point of view, nearly all the cases cited on the other side were distinguishable from the present.

TINDAL, C. J.—The case of *King v. Lord Turner* seems to be directly in point. There, the question was expressly raised. In that case the affidavit of debt did not disclose any connexion between the plaintiff and the defendant, nor did it shew what means the deponent possessed of knowing that the debt existed. That case seems never to have been overruled, and is free from the distinction sought to

(a) 1 Chit. Rep. 161.

(b) 1 B. & P. 1.

(c) 4 Taunt. 231.

(d) Ante, Vol. 3, p. 487.

(e) 1 Chit. Rep. 58.

be taken. With respect to the other objection, I think it was waived by the undertaking to put in bail.

PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged.

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KNIGHT v. WOORE.

R. V. RICHARDS shewed cause against a rule nisi obtained by *Whately*, for reviewing the taxation of the prothonotary. It was an action of trespass. The defendant pleaded—first, Not guilty; and secondly, justified the alleged trespass under a right by the defendant as an inhabitant of Monmouth, on foot and with horses to pass and repass over the plaintiff's close, for the purpose of carrying water and goods from the river Wye. The jury found in favour of the defendant as to the right of way to get water, but not to take goods, from the river Wye. A verdict was afterwards entered according to this finding. On taxation, the prothonotary refused to allow the defendant the general costs of the cause, or of the witnesses who had given evidence both as to the right of bringing goods as well as bringing water. This taxation, it was submitted, was right. In the case of *Larnder v. Dick* (a), the Court held that where some issues are found for the plaintiff, and some for the defendant, the latter is entitled to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him. Again, in the case of *Richards v. Cohen* (b), the marginal note was, "Where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues

In an action of trespass, the defendant justified under a right of way to bring water and goods. The jury found for the plaintiff as to the goods, for the defendant as to the water:—*Held*, that the defendant was entitled to the general costs of the cause, as he had substantially succeeded, and also to the costs of witnesses whose evidence applied to both issues.

(a) Ante, Vol. 2, p. 333.

(b) Ante, Vol. 1, p. 533.

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found against him as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his." The defendant, by his mode of pleading, had set up a right much more extensive than he was able to prove. The plaintiff was thus forced to proceed to the assizes in order to limit that right. In this he was successful, and therefore had succeeded on what was the substantial question between the parties. This entitled him consequently to the general costs of the cause, and also to the costs of those witnesses who were called on that issue on which the plaintiff had succeeded, but who had also given evidence on the other issue on which he had not succeeded.

Whateley, in support of the rule, contended that in the two cases cited the decision of the Court had proceeded on the fact of the plaintiff succeeding on what was the substantial merit of the issue. In this case the defendant had succeeded on what was the substantial question raised between the parties. The real question in dispute was, whether the defendant had a right to approach the river over the plaintiff's close. Whether he did this for the purpose of bringing water or carrying goods was immaterial. But the decision of the jury had established his right. He cited *Frankum v. Lord Falmouth* (a), and *Eades v. Everatt & Another* (b).

TINDAL, C. J.—In the present state of the record the defendant has substantially succeeded, for the jury have found in his favour on the real question which the parties proposed to try. By his replication he severed the right set up by the defendant into two allegations ; one with respect to the carriage of goods, and the other with respect to the carriage of water. If the defendant was improperly

(a) Ante, Vol. 4, p. 65.

(b) Ante, Vol. 3, p. 687.

hindered by the plaintiff from making use of the way either for the carriage of goods or of water, the jury have, by their finding, rendered him substantially the successful party in the cause. He is, therefore, entitled to the general costs of the cause. Then, being entitled to the general costs of the cause, he is entitled to the costs of the witnesses called in support of the issue on which he has succeeded, although they may also have given some evidence on the other issue. The present case may be considered as the converse of *Richards v. Cohen*. There the plaintiff having succeeded on the substantial issue in the cause, and the defendant's witnesses being necessary, both on the issues on which he had succeeded as well as those on which he had failed, the Court was of opinion that the defendant was not entitled to the costs of any of his witnesses.

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PARK, J., GASELEE, J., and VAUGHAN, J. concurred.

Rule absolute.

RANSON v. DUNDAS and Another.

WILDE, Serjt., obtained a rule nisi requiring the plaintiff to shew cause why the judgment signed in this case should not be set aside for irregularity, or amended by striking out so much of it as related to the award of costs, or why the taxation of costs should not be reviewed, proceedings upon the judgment, and the writ of error brought thereon, being in the mean time stayed. A rule nisi for entering up judgment, pursuant to 9 G. 4, c. 22, s. 63, for costs incurred in prosecuting a petition of the plaintiff's against the return of the defendants as burgesses for the borough of Ipswich had been obtained. The sum specified in the Speaker's certificate was the sum mentioned in the rule, nothing being said as to the costs of the suit. Cause was

Under the 9 Geo. 4, c. 22, s. 63, a party entering up judgment for costs, pursuant to the Speaker's certificate, is not entitled to costs incidental to entering up the judgment.

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shewn against this rule, and it was ultimately made absolute. On taxation before the prothonotary, he allowed the sum of 12*l.* 5*s.* for costs of the cause; 26*l.* 1*s.* 5*d.* for costs of the rule to enter up judgment; and 20*l.* 13*s.* 4*d.* for costs of the plaintiff's appearance in the first instance, when the defendant applied for leave to enter a suggestion upon the roll. The judgment was afterwards entered up, both for the amount of the sum mentioned in the Speaker's certificate, and for the costs allowed by the prothonotary. Subsequently, a writ of error was sued out by the defendants, and a rule for its allowance served.

Talfourd, Serjt., *Hill*, and *Austin*, shewed cause, and cited *Tyte v. Glode* (a), *Mayor of Plymouth v. Werring* (b), *The College of Physicians v. Harrison* (c), *North v. Wingate* (d), *Magrave v. White* (e), and *Gurney v. Gordon* (f).

Wilde, Serjt., Sir *W. Follett*, and *R. V. Richards*, supported the rule, and cited *Sharp v. Warren* (g), *Rex v. Commissioners of Flockwold Inclosure* (h), and *Bale v. Hodgetts* (i).

Cur. adv. vult.

TINDAL, C. J.—The rule in this case calls upon the plaintiffs to shew cause why the judgment entered up by them should not be set aside for irregularity; or why it should not be amended by striking out so much thereof as relates to the award of costs; or why the prothonotary should not review his taxation of the costs in the cause, and the judgment be reduced, in regard to the costs, to such amount as should be allowed on such review. And

(a) 7 T. R. 267.

(b) Willes, 440.

(c) 9 B. & C. 524.

(d) Cro. Car. 559.

(e) 8 B. & C. 412.

(f) 9 Bing. 37.

(g) 6 Price, 131.

(h) 2 Chitt. 251.

(i) 1 Bing. 182.

upon shewing cause before us, the argument on both sides has been principally confined to the question—in fact the real question between the parties—whether the plaintiffs, who have signed their judgment in an action of debt under s. 63 of the 9 Geo. 4, c. 22, are entitled to sign judgment for costs in such action, or are limited simply to the amount of the sum mentioned in the Speaker's certificate. The sixty-third section of the last-mentioned statute is borrowed from the thirteenth section of the 53 Geo. 3, c. 71, with which it agrees in substance; before which last-mentioned statute, the remedy for costs and expenses certified by the Speaker, was governed by the twenty-third section of the 28 Geo. 3, c. 52, and directed to be by action of debt in any of his Majesty's Courts of Record at Westminster; in which action it was provided that it should be sufficient for the plaintiff to declare that the defendant was indebted to him (in the sum to which the costs and expenses ascertained in manner aforesaid should amount), by virtue of that act: and it was provided, that the certificate of the Speaker, under his signature, of the amount of such costs and expenses, together with an examined copy of the entries of the journals of the House of the resolution of the select committee, should be deemed full and sufficient evidence in support of such action of debt. And an express provision follows, that no wager of law, or more than one imparlance should be allowed, "and that the party in whose favour judgment should be given in any such action, should recover his costs." It is obvious, therefore, that a trial of the action of debt by a jury was contemplated by the Legislature, for provision is made to take away the trial by wager of law; and although a form of declaration is given by the statute, so as to relieve the plaintiff from all difficulty in that particular, yet, under the general issue of nil debet, or by means of special pleading, very great impediments might have been thrown in the way of the plaintiff's recovery, and points raised as

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to the regularity or legality of the proceedings in Parliament, either by the production of evidence before the jury, or by means of bills of exceptions, or by pleading to the declaration. It is further obvious, that the Legislature thought it necessary to provide for costs by a special enactment, and that the enactment is so framed as not only to give costs to the plaintiff, but to the defendant also, in case the plaintiff failed in recovering his debt. The statute, therefore, of the 53 Geo. 3, & 9 Geo. 4, introduced an entirely new remedy, and conferred a new and very great benefit on the plaintiff. For, after these statutes, the defendant's plea was taken from him; he could neither have any trial of the fact before a jury, nor raise any point of law upon the record. The certificate of the amount of costs and expenses by the Speaker is directed to have the force and effect of a warrant to confess judgment; and the Court is directed upon motion, and on the production of such certificate, to enter up judgment in favour of the plaintiff named in such certificate for the sum specified therein to be due from the defendant; "in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount." If the question, therefore, had rested merely on this comparison between the new and the former provision, the inference would appear to us to be strong that, under the latter, there was no intention in the Legislature to allow costs to the plaintiff upon his judgment. The costs, in all cases under the new provision, would be small when compared with those upon a trial before a jury; in all ordinary cases, very trifling indeed. And when it was observed, that by the first statute, the costs are expressly given to the party who succeeded in obtaining the judgment, which might be either the plaintiff or the defendant; and that by the present statute, the judgment, if entered up, can only be entered up for one party, viz. the plaintiff, and that the statute omits any mention whatever of costs, we think

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it a reasonable inference, that under the new mode of recovering the amount, it was intended the plaintiff should forego his claim to costs, as the price for the greater facility and certainty of obtaining his demand; and we think, even if such inference is not to be drawn, the silence of the new statute as to costs makes that subject a *casus omissus*, and that we have no authority to supply it. But, on another and perfectly distinct ground, we think we have no power to give judgment for costs. This is a statutory power given to the Court to enter up a judgment, and the terms of such power must be strictly followed. The certificate by the Speaker is declared to "have the force and effect of a warrant to confess judgment, and the Court is directed to enter up judgment in favour of the plaintiff, for the sum specified therein to be due from the defendant." This gives an authority expressly to enter up judgment for the very sum mentioned as the amount of the debt, and no more. But, the clause directs the judgment to be entered up "in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount." Now, the statute cannot be more safely construed than by considering what would be the course of proceeding if the defendant had actually signed a formal warrant of attorney to confess judgment in the action to the amount of the sum mentioned in the Speaker's certificate, and the plaintiff had entered up his judgment under such warrant of attorney. In that case, it is the well-known course of practice of the Courts, that, the warrant of attorney being silent as to costs, the judgment would have been entered up for the sum specified as the debt, and for no more. It has been urged in the course of argument, that it would be unjust that the plaintiff should suffer by a vexatious and expensive opposition to his entering up judgment. But, in answer to this, it should be recollected, that there is nothing in the statute which deprives the Court of its inherent authority to fix the de-

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fendant with the payment of costs on a vexatious opposition to a rule for entering up the judgment; such costs, however, not forming part of the judgment itself, but being one of the terms on which the rule is made absolute. We think, therefore, that so much of the rule as relates to the amending of the judgment by striking out the award of costs, must be made absolute, and the residue discharged.

Rule absolute accordingly.

VERE and Others v. GOWAR.

Proceedings to
 outlawry cannot
 be taken on a
 writ of distringas
 originally issued
 to compel an
 appearance.

WILDE, Serjt., shewed cause against a rule nisi obtained by *R. V. Richards*, for setting aside proceedings to outlawry. The objection was, that the distringas on which they were founded had been originally sued out for the purpose of compelling an appearance. The notice at the foot of the distringas was in these terms:—"Mr. Thomas Gowar,—Take notice that I have this day distrained on your goods and chattels in the sum of 40*s.*, in consequence of your not having appeared in Court to answer to said John Vere, Francis Sapte, and William Bunbury, according to the exigency of a writ of summons, bearing date on the 12th day of December, 1835; and in default of your appearance to the present writ within eight days inclusive after the return hereof, the said John Vere, Francis Sapte, and William Bunbury, will cause an appearance to be entered for you, and proceed thereon to judgment and execution."

R. V. Richards supported the rule.

Cur. adv. vult.

Per Curiam.—We think that according to the form of the *distringas* given in the schedule of the Uniformity of Process Act, the plaintiff must make his election as to whether he intends to proceed to outlawry, or merely to compel an appearance, at the time he issues the writ of *distringas*. He has no right to issue the writ for one purpose, and afterwards make use of it for another. In *Fraser v. Case* (a), this Court held, that under 2 & 3 Will. 4, c. 39, s. 3, a *distringas* must be issued either to compel an appearance or for the purpose of outlawry, but not in the alternative. The proceedings to outlawry consequently were irregular, and must be set aside. The present rule will therefore be absolute.

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Rule absolute.

(a) Ante, Vol. 1, p. 725.

WEYMOUTH v. KNIPE.

CROWDER shewed cause against a rule obtained by *Petersdorff*, for referring the plaintiff's bills to taxation. It was an action brought by the plaintiff, who was an attorney, for agency by him for the defendant, who was also an attorney. The Court had no power, it was now contended, to direct an attorney's bill to be taxed, where it was for agency, as the 2 Geo. 2, c. 23, s. 23, only had reference to cases of attornies and lay clients. Besides, the 12 Geo. 2, c. 13, s. 6, in terms excluded claims for fees, charges, and disbursements, "due from any attorney or solicitor to any other attorney or solicitor, or clerk in Court." Independent of these statutes, the Court had no original jurisdiction to refer an attorney's bill to taxation. In *Wilson v. Gutteridge* (a) the Court said, "We have a

The Court has no power to refer an attorney's bill for taxation independently of the 2 Geo. 2, c. 23; and as the 12 Geo. 2, c. 13, takes agents' bills out of the former statute, they cannot be referred for taxation, although a suit is pending for their amount.

(a) 3 B. & C. 157.

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 Knipe.

paramount jurisdiction, independently of the statute, to refer an attorney's bill for taxation." But in *Dagley v. Kentish* (a), and in *Clutterbuck v. Combes* (b), the Court was of opinion that there was so much doubt as to the original power of the Court that it would not refer an attorney's bill to be taxed independently of the statute. In *Howard v. Groom* (c), Mr. J. Coleridge was of opinion that the Court possessed no such power.

Wilde, Serjt., and *Petersdorff*, supported the rule, and cited *Wildbore v. Bryan* (d), *Innes v. Hake* (e), and *Ex parte Bearcroft* (f).

Per Curiam.—We think that our only power of directing an attorney's bill to be taxed is derived from the statute; and by the statute of the 12 Geo. 2, c. 13, s. 6, agents' bills are taken out of the operation of the former statute. The fact of the parties being litigants before the Court does not make any difference. The present rule must therefore be discharged.

Rule discharged.

(a) Ante, Vol. 1, p. 330.

(b) 5 B. & Ad. 400.

(c) Ante, Vol. 4, p. 21.

(d) 8 Price, 677.

(e) 2 Cox, 173.

(f) 1 Doug. 200.

JAMES V. SALTER and Another.

An annuitant under a will must, since the passing of the 3 & 4 Will. 4, c. 27, have recourse to distress or action within twenty years from the testator's death.

REPLEVIN.—Defendants by their avowry and cognizance alleged that the dwelling-house, &c., in which, &c., on the 10th of November, 1804, were the freehold premises of one James Salter, since deceased, father of the defendant Salter, and continued so until his decease; that the taking of the said goods and chattels was done in pursuance of a certain power contained in the last will of the said J. Salter, dated the 3rd August, 1800, for raising

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and paying a certain annuity, yearly rent, or sum of 30*l.*, bequeathed by the said will to the defendant Salter, and charged and chargeable on the said freehold premises; and because the sum of 870*l.*, part of the said annuity, yearly rent, or sum of 30*l.* accruing due at Christmas-day last, was unpaid for the space of twenty days after the said Christmas-day, the same having been lawfully demanded, the defendant Salter in his own right avowed, and the other defendant as bailiff to the defendant Salter acknowledged, the taking the said goods and chattels to satisfy the said arrears, according to the purport, tenor, and effect of the said will.

The plaintiff pleaded in bar, and secondly, that the said distress in the avowry and cognizance mentioned, was not made at any time within twenty years next after the time at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant Salter. Thirdly, that it was not made within six years after the said arrears, in respect of the said annuity, yearly rent, or sum of 30*l.* first became due.

To the second plea, the defendants replied, that so far as the same related to 585*l.*, part of the money in the avowry and cognizance mentioned, the distress was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant Salter. And as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognizance mentioned, the defendants relinquished their avowry and cognizance, and prayer of judgment, so far as the same related thereto. And to the third plea, the defendants replied, that the distress was made within six years next after the arrears in respect of the annuity, yearly rent, or sum of 30*l.* first became due.

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The jury found a special verdict, the facts of which will be found stated in the judgment.

Crowder argued the case on the part of the plaintiff.

Butt argued on behalf of the avowant.

Cur. adv. vult.

TINDAL, C. J.—The question which has been argued before us, arises upon a special verdict found on the second and last issues raised between the parties to this action: the second issue being upon the question, “whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognizance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant John Salter;” and the last issue being upon the question, “whether the distress in the avowry and cognizance mentioned, was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.* first became due.” Of these two issues, the first appears to us to be the principal, and, indeed, the only important one: for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant Salter to the annuity is altogether barred; and he cannot, in any view of the case, be allowed to recover the arrears for the last six years, to which only the pleadings on which the last issue is raised can be held to apply. The facts which are found by the special verdict on the two issues are few and simple:—That John Salter, the father of the defendant of that name, by his will duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to John Salter the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.*, by four quarterly

payments, to commence on the first quarterly day of payment after his decease, with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will; and that, on the 17th March, 1835, the defendants distrained for 870*l.*, for twenty-nine years' arrears of the annuity ending at Christmas, 1834. Upon this state of facts, it appears that the right to make a distress for the annuity first accrued to John Salter, the son, on the expiration of the twenty days next after the first quarterly day of payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appears, that so far as there is any allegation on the record, or any finding by the jury, there was no payment or receipt of the annuity by the defendant Salter, before the distress was put in, in March, 1835; for it was then put in by the defendant for the whole of the arrears since the death of the testator. And although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing from the record, that no distress was made for twenty-nine years after the the right to distrain first accrued. Now, upon reference to the statute 3 & 4 Will. 4, c. 27, it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made, the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The second section contemplates and provides for the case where the right or title to the annuity itself is disputed, and directs "that no person shall make a distress for any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same." The

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42nd section contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made for arrears due; and for that purpose directs "That no arrears of rent shall be recovered by any distress but within six years next after the same respectively shall have become due." The second issue arises upon a plea in bar, framed upon the second section; the last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the 42nd section. Now, with respect to the second issue, it is manifest that the facts found in the special verdict will bring the case precisely within the provision of the second section of the act, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section does in terms exclude from the operation of the second, the claim of any person whose right to a rent is derived under a will, by reason of the words "other than by will," which are found in the third section. And when this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the Judges then in Court, that the present case was excluded from the operation of the second section by reason of its not being comprehended within the third; which third section appeared to us, upon a more hasty view, to contain an enumeration of instances to which only the second section could be held to be applicable. For myself, however, I am ready to admit, and I am authorized at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother *Vaughan* entirely concurs with us), that

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this case is governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity. That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the third section, the object and intent of it seem to us to be no more than this: to explain and give a construction to the enactment contained in the second clause as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances except those enumerated in the third section. Again, if the words "granted by any instrument other than by will" were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for the instance in the third section, immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend and would comprehend all executory devises; and again, section 40 expressly provides for the case of any legacy. And indeed, the words "by any instrument other than by will" carry the matter no further than

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if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz. the devise of an estate in possession in land, or of an estate in possession in a rent charge first created by the will, would be altogether unprovided for by the statute. For the third class of instances enumerated in section 3, describes the grant to be "by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly-created rent; for the devisor who has, by his will, carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee; still less can the devisor who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff. As to the last issue, founded upon the limitation of six years given by the forty-second section, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by such finding. For

there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowant's claim to a return of the cattle, &c., is completely barred, whatever may become of the other pleas in bar. Now, taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due. For upon the last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years. We therefore think the verdict on the last issue must be entered for the defendant; but that upon the whole record the judgment must be for the plaintiff.

Judgment for the plaintiff.

DAVIS and Others *v.* JONES.

HUMFREY applied on the part of the defendant in this action that the prothonotary might be instructed to enter satisfaction on the roll. It appeared that the action was brought by the plaintiffs, who were five in number, on a guarantee for 1600*l.*, when a verdict was returned for the plaintiffs. He now produced an affidavit, in which it was sworn that the verdict had been satisfied long ago, and that all the plaintiffs, except one, had expressed their willingness that satisfaction should be entered. The last-mentioned person was in America, and his consent could not be obtained.

The Court will not order the prothonotary to enter satisfaction on the roll in a case where four only of five plaintiffs have given their consent, although the fifth plaintiff is resident in America and cannot be found, and his attorney consents.

TINDAL, C. J.—How many years has he been there?

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Humfrey said that he had an affidavit sworn on the 9th January, 1835, by the defendant's attorney, in which it was stated that he had been absent since 1833.

TINDAL, C. J.—Why do you not obtain his consent to the entry of satisfaction?

Humfrey said that there was a difficulty in finding him.

TINDAL, C. J.—This plaintiff in fact may have received no satisfaction, and the Court therefore, as the case now stands, cannot grant the rule prayed. You had better make some inquiries as to his agent.

Humfrey said that his attorney was quite willing that the satisfaction should be entered.

TINDAL, C. J.—But the attorney's duty ends when judgment is signed. You had better endeavour to obtain some more evidence, and then come to the Court.

Rule refused.

Dr. Hurd v. Dr. Hurd. 20 L. J. C. P. 110.
Bullock v. Bullock. 22 L. J. C. P. 24.

WORTHINGTON and Mary his Wife v. WIGLEY.

Reported 5 Bingham: N. L. 464.

DEBT on bond for 1100*l.* given by the defendant to the plaintiff's wife, dum sola, and conditioned for the payment of 552*l.* 19*s.* and interest, on the 31st January, 1832.

The defendant pleaded—first, as to 276*l.* 13*s.*, parcel of the 552*l.* 19*s.* and interest, that after the 31st of January, 1832, while the plaintiff, Mary, was unmarried, and before the commencement of this suit, to wit, on the 18th March, 1833, she drew several bills of exchange on the defendant (stating the particulars) for and on account of the said sum of 276*l.* 13*s.*, payable on days not yet arrived; that the

In debt on bond, a defendant cannot plead as to part the receipt of certain bills of exchange, and, as to the residue, payment of certain monies in satisfaction.

defendant accepted such bills, and delivered them to the plaintiff Mary, who took and received the same on account of the said sum of 276*l.* 13*s.*, and the causes of action in respect thereof. Secondly, as to the residue of the said sum and interest, that after the 31st of January, 1832, while the plaintiff Mary was sole, the defendant paid to the said Mary, who then accepted and received from the defendant, divers monies, to the amount of the said residue and interest, in full satisfaction and discharge of the same.

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To these pleas the plaintiff demurred, and the defendant joined in demurrer.

Swann supported the demurrer, and contended that the first plea was no answer to the action, as the accepting a *bill of exchange* could not be considered as an answer to an action on a *bond*, because the bond was a debt of a higher degree. He cited *Davis v. Gyde* (a), Com. Dig. *Pleader*, 2 W. 46, and *Doe d. Gregson v. Harrison* (b). With respect to the second plea, that was bad also, because, being a plea of *solvit post diem*, it could not be pleaded to a part of the cause of action.

Miller supported the pleas, and submitted that the effect of them was to shew the condition of the bond to have been satisfied.

Per Curiam.—We think the pleas cannot be supported. The plaintiff therefore is entitled to judgment.

Judgment for plaintiffs.

(a) 2 Ad. & El. 624.

(b) 2 T. R. 425.

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Semble, that the Uniformity of Process Act does not affect the time within which attorneys shall be bound to plead.

BRENTON v. LAWRENCE.

F. V. LEE shewed cause against a rule which had been obtained by *Ball* on a previous day for setting aside the judgment signed in this case, and for the payment of the costs incurred by the defendant subsequent to the judgment. The question which arose was, whether since the Uniformity of Process Act the practice of the Court with regard to the time of pleading by attorney-defendants was altered. The declaration in the present case was filed on the 30th November, and notice to plead within four days served on the defendant, who was an attorney living out of town, on the 1st December. Judgment was signed on the 8th. Before the Uniformity of Process Act, an attorney-defendant was entitled only to four days to plead, even though living more than twenty miles from London—*Mann v. Fletcher* (a), and he submitted that the Uniformity of Process Act had not altered the practice on this point, and referred to a case of *Lewis v. Curr*, decided in the course of the present Term in the Court of Exchequer, in which the proposition which he supported was laid down, the Court saying in that case that the act merely pointed out and directed the form and mode of commencing actions. He submitted, therefore, that the practice of the Court in this point was precisely as it was before the act. He then proceeded to urge some other grounds on which he submitted the rule must be discharged, but offered to allow it to be made absolute without costs, the defendant undertaking to pay within a week the debt and costs up to signing judgment.

TINDAL, C. J.—What you have said with regard to the language of the act has its weight, for that seems to apply

(a) 5 T. R. 369.

only to the form of commencing the action. I think, however, the defendant should accept the terms proposed.

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Ball consented to accept the terms, and the rule was made absolute.

Rule absolute accordingly.

DOE *dem.* MOORE v. SAVAGE.

SAUNDERS applied to make an order of Mr. Justice *Vaughan* a rule of Court. The order was that defendant should be at liberty, without further notice to the plaintiff, to enter up judgment as in case of a nonsuit if the plaintiff should not proceed to trial at the sittings after Term. Plaintiff had made default, and his application was to make it a rule of Court, in order to obtain judgment accordingly. The only question was, whether the rule should be absolute in the first instance.

A rule to make a Judge's order a rule of court for judgment as in case of a nonsuit, is absolute in the first instance; but, although notice shall have been given to the opposite party, it cannot be made a part of the same rule, that judgment shall be entered up, and execution issued.

PARK, J.—Yes, the rule must be absolute.

Saunders then handed in his papers, but the prothonotary mentioned that his brief was indorsed also for judgment to be entered up and execution issued.

Saunders said that *ex gratiâ* notice had been given to the other parties, and contended that these terms might be included in the rule.

PARK, J.—That must be the subject of a separate rule.

Rule accordingly.

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DOE *d.* EVANS *v.* ROE.

If the date of the notice in a declaration in ejectment conveys sufficient information to the tenant, the title is immaterial.

SWANN moved for a rule for judgment against the casual ejector. The title of the declaration was in Michaelmas Term, in the 8th year of the reign of the King, but the notice was dated the 20th December, 1836.

PARK, J.—Michaelmas Term in the 8th year of his Majesty's reign has not arrived. You cannot have the rule.

On a subsequent day in Term, however, by

PARK, J.—I understand the practice in the King's Bench to be that the title of the declaration is considered immaterial. You may therefore take a rule.

Rule granted.

DOE *d.* ROBERTS *v.* ROE.

Where a declaration in ejectment is served, with two notices annexed, one requiring the appearance of the defendant, and the other that he should enter into recognizances on his appearance, the latter may be treated as surplusage.

OGLE applied for a rule for judgment against the casual ejector. The declaration was regular, but there were two notices annexed, one in the usual form, calling on the tenant to appear in Hilary Term, and the other requiring him to appear, and then and there to enter into recognizances, pursuant to the 1 Geo. 4, c. 87.

PARK, J.—Take a rule, and treat the second notice as surplusage.

Rule granted.

KING'S BENCH PRACTICE COURT.

Hilary Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

TOMKINS v. GEACH and Others.

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O'MALLEY shewed cause against a rule nisi for judgment as in case of a nonsuit obtained by *Petersdorff*, on the ground of a defect in the title of the affidavit on which the rule was founded. The present was an action against several defendants. In the title of the affidavit, the names of all the defendants were not written at length, but it was intitled "*Tomkins v. Geach and Others.*" This, it was submitted, was insufficient.

Where there are several defendants, the names of all must be introduced into affidavits used to make applications in the Court; and, therefore, all besides one cannot be included under the words "and others."

WILLIAMS, J., (after consulting Mr. *Hill*, the clerk of the rules), was of opinion that the affidavit was improperly intitled, and discharged the rule.

Rule discharged.

WELLS v. LANGRIDGE.

HUMFREY shewed cause against a rule nisi obtained by *Waddington*, requiring the plaintiff to shew cause why a suggestion should not be entered, under the 23 Geo. 2, c. 33, s. 19, (the Middlesex County Court Act), to give the defendant double costs, on the ground of the plaintiff only having obtained a verdict for 40s. The action was

If the verdict of a jury, exceeding 40s., is reduced by the Court below that sum on a point of law, the defendant may obtain his double costs under the

Middlesex County Court Act, if liable to be summoned under it.

The fact of the cause being tried on a writ of trial does not interfere with the defendant's claim.

The cause of action must arise, as well as the defendant reside, within the jurisdiction, in order to bring the case within the meaning of the statute.

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brought to recover the sum of 3*l.* 6*s.* 4*d.*, partly for work and labour and medicines supplied by the plaintiff as an apothecary, to the amount of 2*l.* 2*s.*; partly as the balance on the sale of a mare, to the amount of 1*l.* 4*s.* 4*d.* The defendant paid 5*s.* 9*d.* into Court, and pleaded non assumpsit as to the rest. The case was tried before the under-sheriff, and it was then proved that the sum of 1*l.* 4*s.* 4*d.*, in respect of the balance on the sale of the mare, had been paid either at the defendant's residence, in Holborn, in the county of Middlesex, or at Dixon's Repository, Barbican, in the city of London. It was objected, however, on the part of the defendant, that as the plaintiff had not proved himself to be a certificated apothecary, pursuant to the 55 Geo. 3, c. 194, s. 21, he could not recover for the 2*l.* 2*s.* The jury, however, found a verdict in favour of the plaintiff, to the amount of 3*l.* 0*s.* 7*d.*, beyond the 5*s.* 9*d.* paid into Court. An application was afterwards made to the Court of King's Bench to reduce the verdict to the extent of 2*l.* 2*s.*, and it was reduced accordingly. The verdict was thus left standing for 18*s.* 9*d.*

Humfrey submitted, that as the jury had found a verdict for a sum exceeding 40*s.*, and that verdict was reduced below the limited amount by the Court, the case did not come within the statute. Besides, the whole cause of action must have arisen within the jurisdiction of the County Court; *Tubb v. Woodward*(a). But here, a portion of the plaintiff's claim must be taken to have arisen in the city of London. The probability was, that as the mare had been sold at Dixon's Repository, in Barbican, the money had been paid to the defendant there. Under these circumstances, it was submitted, that the defendant could not succeed in his rule, but that it must be discharged with costs.

(a) 6 T. R. 175.

Waddington, in support of the rule, contended, on the authority of *Chadwick v. Bunning* (a), that the verdict must be considered as conclusive with respect to the amount of the plaintiff's demand. The "verdict" must of course mean the *legal* verdict; and that was the sum to which the Court was of opinion the original finding of the jury ought to have been reduced. The original sum of 3*l.* 0*s.* 7*d.*, for which the jury first found, was only conditional on the opinion of the Court, as to the sum for which the verdict ought to be entered. The Court reduced the sum of 3*l.* 0*s.* 7*d.* below 40*s.*, and therefore that sum was to be considered as the real finding of the jury (b). The present rule ought consequently to be made absolute.

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LITTLEDALE, J.—This was a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion, under the 23 Geo. 2, c. 23, s. 19, to entitle him to double costs, on the ground that the damages recovered were under 40*s.* The action was for 3*l.* 6*s.* 4*d.*, of which 2*l.* 2*s.* was for a surgeon and apothecary's bill, and the rest for a sum of money which had been paid into the defendant's hands as the balance arising from the sale of a mare of the plaintiff's, which had been sold at Dixon's Repository: 5*s.* 9*d.* was paid into Court. The cause was tried before the under-sheriff, and the jury gave a verdict for the plaintiff for 3*l.* 0*s.* 7*d.* A motion was afterwards made in the Court of King's Bench, and a rule made absolute to reduce the damages to 18*s.* 9*d.*, on the ground that the plaintiff had not proved himself duly licensed to practise as an apothecary. The plaintiff in shewing cause against the present rule contended—first, that the act of 23 Geo. 2, c. 23, only applied to cases where the jury gave damages under 40*s.*,

(a) 5 B. & C. 532.

(b) See *Morgan v. Ruddock*, ante, Vol. 4, p. 311.

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whereas here they had given more, and they were reduced by the Court. It does not appear very clear from the notes of the under-sheriff, whether liberty was given to apply to the Court of King's Bench to reduce the damages; but I must intend that the parties had upon the trial consented that this should be done, as otherwise this Court would have sent the case to a new trial; and if the parties consented that the Court should have power to reduce the damages, it then became the same thing as if the jury had given the smaller verdict, which, in point of law, they ought. It was also said that the real debt was above 3*l.*, as found by the jury, and if that be reduced on a point of law, it is not within the act; but I think that makes no difference: if it could not be recovered in point of law, it is the same as if it had no existence. It was also contended that the money received by the defendant on the sale of the mare was, in fact, received by the defendant at Dixon's Repository, which is in the city of London, and not in the county of Middlesex; and that as, taking the whole act together, and more particularly adverting to the 1st, 4th, and 19th sections, the Court under that act had no jurisdiction, except in cases where the County Court had jurisdiction before the act, and which they had not in cases where the cause of action arose out of the jurisdiction; and I am of opinion that if in fact the defendant had received the money in the city of London, and therefore out of the jurisdiction of the County Court of Middlesex, and that fact had now appeared before me, I should have been of opinion that, notwithstanding the general words in the 19th section, "if the defendant shall reside in the county of Middlesex, and be liable to be summoned to the County Court," that taking the whole act together it must mean, liable to be summoned for a cause of action arising within the jurisdiction; but it does not appear from the notes of the under-sheriff that the cause of action did arise in the city of London; and though Dixon's Repository is in the city, and the defend-

ant lives in High Holborn, in the county of Middlesex, one of the people belonging to the Repository may as well have taken the money up to the defendant as the defendant have sent for it. If the plaintiff had made an affidavit to shew how that was, it might have been attended to, because on the trial of this cause it was not likely to be made a question where the money was received. In the absence, therefore, of proof to the contrary, I must intend that the defendant, who without doubt resides in the county of Middlesex, was also liable to be summoned in that county, as it would be *prima facie* presumed that he received the money at his own domicile; and I am therefore of opinion that the rule must be made absolute.

During the argument I suggested a doubt, whether on a writ of trial before the sheriff, there could be a suggestion under this act; but on further considering it, I am not prepared to say that my doubt was well founded.

Rule absolute.

In the Matter of Arbitration between SMITH and REEVES.

C. CHADWICK JONES shewed cause against a rule nisi obtained by *Wilson*, for an attachment against John Smith, for the non-performance of an award and umpirage by paying certain sums, and delivering up certain premises. The objections to the umpirage were four in number; first, that the affidavit of service of the copy of the award and umpirage was defective, inasmuch as it stated it to be the award and umpirage of Thomas *Ward* instead of Thomas *Wood*; secondly, that no affidavit was produced of the several enlargements by the arbitrators; thirdly, that the premises in question had been sold by Smith before the submission to arbitration, and consequently the

are made a part of the rule of Court, an affidavit of such enlargements is not necessary in order to obtain an attachment.

An affidavit of the service of an award and umpirage, disclosing a regular service, is sufficient to obtain an attachment for non-performance, although the surname of the umpire is misdescribed.

Where an arbitrator has the power to enlarge the time for making his award, and the enlargements

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arbitrators had no jurisdiction over them; fourthly, that there was no affidavit shewing that Reeves had paid the whole of the costs, a moiety of which it was sought now to recover pursuant to the terms of the submission. *Jones* cited *Davis v. Vass* (a), *Wohlenberg v. Lageman* (b), and *Halden v. Glasscock* (c).

Wilson, in support of the rule, cited *Dickins v. Jarvis* (d).

Cur. adv. vult.

LITTLEDALE, J.—This was an application for an attachment against John Smith for the non-performance of an award in not paying the sum of 105*l.* 8*s.* 10*d.* to William Reeves, and in not delivering up to William Reeves a box No. 5, near the London Docks, to which were attached certain privileges, and in not paying a moiety of the sum of 60*l.* 9*s.* 6*d.*, found due for costs. The parties, Smith and Reeves, had been partners, and the business had been carried on at the above-named box No. 5, and by agreement of the date of 5th August, 1835, they agreed to refer their partnership disputes to arbitration. The reference was to two persons, and such person as they should appoint to be umpire, or to assist them in the premises, so that the award of the two arbitrators, and of such third person as they should appoint if any such should be so appointed, or any two of them, should be made on or before the 5th of September, and with power for the arbitrators, by writing under their hands, to be indorsed on the said agreement, to enlarge the time for making their award as often as they should think proper; and then the agreement goes on to state that if the arbitrators should not agree, the umpire might make the award, and that the

(a) 15 East, 97.

(b) 6 Taunt. 251.

(c) 5 B. & C. 390.

(d) 5 B. & C. 528.

submission to arbitration should be made a rule of Court. The arbitrators made several enlargements of the time, and also appointed Thomas Wood as an umpire, who made his award and umpirage on the 9th April, 1836, and ordered the several things before mentioned to be done. The original submission to arbitration, the several enlargements by the arbitrators of the time, and the appointment of the umpire, were made a rule of Court in one rule. The affidavits on which to ground the attachment were in the usual form, but in the affidavit of the service of the copy of the award and umpirage it is stated that the person served John Smith with a true copy of the award and umpirage of Thomas *Ward* hereto annexed, and at the same time shewed him the original award and umpirage. The service of the other documents was correct. In shewing cause against the rule for the attachment, *Smith* objected—first, that the affidavit of the service of the copy of the award and umpirage was insufficient, as it stated it to be an award and umpirage of Thomas *Ward* instead of Thomas *Wood*; secondly, that there was no affidavit of the fact of the several enlargements made by the arbitrators; thirdly, that the box in question, No. 5, had been sold by Smith before the submission to arbitration, and therefore the arbitrators had no jurisdiction over it; and fourthly, as to the moiety of the costs of 60*l.* 9*s.* 6*d.*, that they were to be borne in moieties, and that if either party should pay the whole, the other party should repay him a moiety; and there was no affidavit that Reeves had paid the whole, and till he had done so he could not call on Smith to repay him a moiety. As to the first objection, I think it is not tenable; there certainly are cases where the document served upon the party has varied, in some slight degree, from the real name in the proceedings, as in *Smith v. Calvert* (a), and several cases there referred to; but there the

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(a) Ante, Vol. 2, p. 276.

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process served on the defendant was not correct, and, therefore, he was held not to be in contempt; but here the document served on the defendant is correct, for the copy of the award and umpirage is in the name of Thomas *Wood*, and the defendant, therefore, by the service upon him, and refusal to pay, is in contempt, and the only objection is the verifying it to the Court; and as to that, I think, as the affidavit states that he was served with a true copy of the award, which is correct, and was shewn the original, which is also correct, the name Thomas *Ward*, which is inconsistent with that, may be rejected as surplusage.

As to the second objection, there are several cases where it has been held that the fact of the enlargement must be verified by affidavit; *Davies v. Vass* (a), *Wohlenberg v. Lageman* (b), *George v. Lousley* (c), *Halden v. Glasscock* (d). But in *Dickins v. Jarvis* (e), the rule is laid down differently, and Mr. Justice *Bayley* says: "I take it to be a matter of course, that where a submission to arbitration contains a power to enlarge the time for making the award, and the enlargement of time is made a rule of Court, that is sufficient for the purpose of obtaining an attachment, just as if the award had been made within the time originally granted. This case differs from that which has been referred to, for there, the time was enlarged by a Judge's order, and that did not appear on the face of it to be made by the consent of the parties; it appeared to be made *proprio vigore judicis*, and therefore was not binding. Here, the parties agreed that an enlargement by the arbitrator should be valid. The Court must have credit for not making it a rule of Court without a sufficient affidavit. If that were otherwise, every rule for an attachment for disobedience to a rule of court must be a rule *nisi*." I certainly concur in the view taken by

(a) 15 East, 97.

(d) 5 B. & C. 390.

(b) 6 Taunt. 254; 1 Marsh. 579.

(e) 5 B. & C. 528.

(c) 8 East, 13.

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Mr. Justice Bayley. Here, all the various enlargements have been incorporated in the rule of Court, and it must be intended that the Court had proper materials for making them so; the parties consented that the arbitrators might enlarge the time, and the copy of the rule served on Smith apprises him that they had pursued the authority which he and Reeves had given them. As to the third objection, the box No. 5 was not specifically a subject of reference, but only as it was part of the subjects connected with the partnership; and as it had been sold by Smith before the submission, it is not to be considered as included in the submission, and as far as that goes, the attachment cannot be enforced. On the fourth objection, the award directs that either party who pays the whole 60*l.* 9*s.* 6*d.* may recover the moiety against the other; there is an affidavit that Smith was informed that the whole of the costs had been paid by Reeves, but there is no affidavit that in fact they had been so paid, and therefore the attachment cannot be supported as to the 30*l.* 9*s.* 6*d.* But as to the 105*l.* 8*s.* 10*d.* there is no objection, and therefore, as to that, the rule may be made absolute. But the attachment should be a fortnight in the office. Though Reeves cannot recover the 30*l.* 9*s.* 6*d.*, the moiety of the costs under this rule, he is not to be shut out of them altogether; but as I think it would be vexatious to Smith to be subject to two proceedings under the award, I think Reeves must undertake not to sue out any writ or process, or take any proceedings against Smith for non-payment of the moiety of the costs, until the expiration of one calendar month after a demand in writing for such moiety has been made by Reeves upon Smith, to be served upon him personally, or left at his usual place of abode; and if Reeves will not give such undertaking, this rule to be enlarged till next term.

1837.

ROBINSON v. TAYLOR.

Issue joined in a country cause in Easter Vacation; no notice of trial for the Summer Assizes; judgment as in case of a nonsuit may be moved for in the following Michaelmas Term.

WIGHTMAN shewed cause against a rule nisi obtained by *Cooke*, for judgment as in case of a nonsuit. Issue was joined in Easter Vacation, and the rule moved for in the following Michaelmas Term. It was a country cause, and no notice of trial had been given for the Summer Assizes. It was now contended that the application was too soon, as even supposing that the issue must be considered as joined in Easter Term, the plaintiff not being obliged to take more than one step in the cause in a term, he would not be compelled to enter the issue until Trinity Term. It was true, that by 1 Reg. Gen. H. T. 2 Will. 4, s. 70 (a), no entry of the issue was necessary, in order to enable the defendant to move for judgment as in case of a nonsuit; but that did not interfere with the practice on this subject, as to the time when the plaintiff was bound to proceed to trial. Entering the issue was a step in the cause, and if for the convenience of the defendant the necessity for entering it was removed, in order to enable the defendant to apply for judgment as in case of a nonsuit, that did not interfere with the right of the plaintiff to have a certain time for proceeding to trial according to the practice of the Court. He cited *Wingrove v. Hodson* (b), and *Douglas v. Winn* (c).

Cooke, in support of the rule, cited *Williams v. Edwards* (d).

Cur. adv. vult.

LITLEDALE, J.—This was a rule for judgment as in case of a nonsuit, in a country cause, moved in the present (Michaelmas) term. Issue was joined in Easter Vacation, and no notice of trial was given for the assizes. The

(a) Ante, Vol. 1, p. 192.

(b) Ante, Vol. 2, p. 379.

(c) Ante, Vol. 4, p. 559.

(d) Ante, Vol. 3, p. 183.

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plaintiff objected that the defendant came too soon, for the plaintiff was only bound to take one step in a term, and admitting that the issue being joined in Easter Vacation was the same thing as if it had been joined in Easter Term, he had Trinity Term to enter the issue on record, and then he had Michaelmas Term in which to give notice of trial, though the rule of H. T. 2 Will. 4, says that no entry of the issue shall be deemed necessary to entitle the defendant to move for judgment as in case of a nonsuit; yet, in *Williams v. Edwards* (a), Baron Parke says this rule is not to vary the time of moving for judgment as in case of a nonsuit. Taking it then, according to the old practice, the course of the Court was, that the plaintiff might have been ruled to enter the issue in Trinity Term, and if he omitted to do so, he was not to be in a better situation than if he had gone on according to the course of the Court. At the end of Trinity Term, therefore, the cause was fully ripe for trial, and nothing more remained to be done; and as a trial in a country cause has nothing to do with the term, it was his duty to have gone to trial at the Summer Assizes; for it would be a most singular course of practice if he were to be allowed to pass over the assizes and wait till Michaelmas Term, and then give notice of trial for the Spring Assizes. The case of *Smith v. Rigby* (b) is in point, as well as the case of *Williams v. Edwards*, above referred to. I am of opinion, therefore, that the defendant does not come too soon, and that the rule must be made absolute. Several cases have been cited by Mr. *Wightman*, but none of them are the same as the present. I do not give any opinion as to what would have been the practice, with the same dates, as to a town cause.

Leave was afterwards given to the plaintiff to produce an affidavit to excuse his delay, so as to entitle him to have the rule discharged on a peremptory undertaking.

(a) Ante, Vol. 3, p. 183.

(b) Ante, Vol. 3, p. 705.

1837.

BARNARD v. SYMONDS.

A defendant, who has not been confined within the walls of the prison, but has had the benefit of the rules, is not entitled to his discharge under the 48 Geo. 3, c. 123, though "in execution" twelve successive calendar months.

BALL applied for the discharge of a defendant out of custody, pursuant to 48 Geo. 3, c. 123, he having remained in execution for twelve successive calendar months in respect of a debt not exceeding 20*l*. A peculiarity existed in the case, inasmuch as it appeared from one of the affidavits with which he was furnished, that the defendant had not been in custody within the walls of the prison during the twelve months, but that he had been living within the rules. It had been decided in the case of *Gilbert and Another v. Pope* (a), by the Court of Exchequer, Mr. Baron *Alderson* sitting alone, that such a case did not come within the statute. The learned Baron's opinion had proceeded on the authority of *Sumption v. Monxani*, which was an unreported case decided by the full Court of King's Bench in Easter Term, 1836. In Mr. Chapman's Practice, however, a case of *Day v. Thomas* was mentioned, in which a contrary decision had been pronounced. The words of the statute being "in execution," it was a forced construction to determine that that meant "in actual custody."

WILLIAMS, J.—I think that, as the case of *Sumption v. Monxani* was decided in the full Court of King's Bench, I am bound by it. I am therefore of opinion, that the defendant is not entitled to his discharge.

Rule refused.

(a) Ante, p. 449.

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WHITMORE v. NICHOLLS.

ERSKINE PERRY moved for a rule to shew cause why the demurrer in this case should not be set aside, on the ground of its not complying with 2 Reg. Gen. H. T. 4 Will. 4, (Practice Rules (a)), in sufficiently stating the points of law on which the defendant intended to insist at the time of argument. It was a general demurrer to a declaration, and a vast number of causes of demurrer were stated in the margin, but it was not stated on which the defendant proposed to rely. It was therefore impossible for the plaintiff to know on which the defendant really did intend to rely. The object of the rule was to enable the party, to whose pleading his opponent had demurred, to know precisely what question of law was to be discussed at the time of arguing. But if a party were allowed to introduce a great number of causes of demurrer without stating on which of them he intended to rely, the object of the rule would be completely frustrated. The words of the rule were, "In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a *frivolous* statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea." Surely this must be considered as a frivolous statement of the causes of demurrer, since it was left entirely in doubt on what grounds he meant to rely. The mere statement of a number of supposed grounds of demurrer, many of which were not even arguable, could hardly be considered as a compliance with the rule.

If a demurrer to a declaration specifies several grounds of demurrer in the margin, it is a sufficient compliance with 2 Reg. Gen. H. T. 4 Will. 4, (Practice Rules), without specifying on which of those grounds the defendant intends to rely.

WILLIAMS, J.—I do not think that the omission to state on which of the grounds of demurrer he has pointed out

(a) Ante, Vol. 2, p. 304.

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in the margin he intends to rely, is a ground for setting it aside under the rule of court on which this application is founded. All that can be said is, that he has stated more than was required. It may be that there are several grounds stated in the margin which cannot be sustained, when they come to be argued. But that does not vitiate the other points, or render this statement a nullity, so as to entitle the plaintiff to set aside the demurrer and sign judgment as for want of a plea.

Rule refused (a).

(a) See *Lyndhurst v. Pound*, that the above rule applies as well ante, p. 459, where it was held to special as to general demurrers.

The Emperor of BRAZIL v. ROBINSON and Others.

The Court will compel a foreign potentate, plaintiff, to find security for costs, in a cause arising out of commercial transactions.

M*MARTIN* shewed cause against a rule nisi obtained by *W. H. Watson*, for compelling the plaintiff to find security for costs, on the ground of his being resident abroad. He cited *The Duke de Montellano v. Christin* (a). That was an application to compel the plaintiff to give security for costs. He was the Ambassador from the Court of Spain. There Lord *Ellenborough* said—"Considering that an ambassador is the immediate representative of the crowned head whose servant he is, it would hardly be respectful in the first instance to exact such a security, unless there were pregnant reasons for believing it to be necessary." The ground therefore on which the opinion of the Court in that case proceeded was, that the ambassador was the representative of a crowned head. The Court would not compel that representative to find security for costs, and therefore, à fortiori, would not the Court compel the crowned head itself to find security for costs. The present rule must therefore be discharged.

(a) 5 M. & Sel. 503.

W. H. Watson, in support of the rule, contended that the case cited on the other side was perfectly distinguishable from the present. There, the Spanish Ambassador was resident within the jurisdiction of the Court, and there was no suggestion in the affidavits, on which the application was founded, that the plaintiff was about to remove from the jurisdiction. Here, however, the plaintiff was entirely out of the jurisdiction, and therefore no reason existed for placing him in a better situation than any other plaintiff who was resident abroad.

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WILLIAMS, J.—If the ambassador could not be compelled to find security for costs, I do not see how I can compel his sovereign to find such security. I do not, therefore, think I am authorized to interfere by compelling the plaintiff to find security for costs. The present rule must therefore be discharged. If it is desired, the application may be renewed in the full Court.

Rule discharged.

W. H. Watson afterwards renewed his application in the full Court, and stated that it appeared from the affidavits on which he moved, that the action was on a charter-party, for not duly delivering certain wood shipped by the Emperor from Brazil to this country. His Imperial Majesty, therefore, having engaged in commerce, must be subjected to the same liabilities as any other commercial person. If the proceeding had been in respect of any matter connected with his political rank, the case might have been different.

Martin shewed cause in the first instance, and again cited *The Duke de Montellano v. Christin* (a).

(a) 5 M. & Sel. 503.

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LORD DENMAN, C. J.—I think that the case cited in opposition to this application is clearly distinguishable from the present. There, the ambassador was in this country merely in his political capacity, and there was no reason to suppose that he was desirous of leaving the country, or going out of the jurisdiction. Here, however, the emperor appears to have engaged in a commercial transaction, and to be resident out of the jurisdiction. I see no reason, therefore, for exempting him from the necessity of finding security for costs, to which any other person bringing such an action would be subjected. The present rule must consequently be made absolute.

LITTLEDALE, J., PATTESON, J., and COLERIDGE, J., concurred.

Rule absolute.

STACEY v. JEFFRYS.

Issue joined, in a town cause, in Hilary vacation, on the 2nd February, and an order obtained on the 3rd to try before the sheriff:—
Held, that it was too early to apply for judgment as in case of a nonsuit, in the following Easter Term, although several sheriff's court days had passed since the order was obtained.

ARCHBOLD shewed cause against a rule nisi, obtained by *George*, for judgment as in case of a nonsuit. It appeared from the affidavits that issue had been joined on the 2nd February, and on the 3rd of that month an order was made by a judge to try the cause before the under-sheriff. Since that time, several court days have passed, without any notice of trial having been given. It was a town cause, and as the plaintiff was entitled to three terms within which to proceed to trial, the present application must be considered as too early, the rule having been moved for in Easter Term. He cited *Harle v. Wilson* (a) the marginal note of which was, "The issue in a country cause ordered to be tried before the sheriff was joined on

(a) Ante, Vol. 3, p. 658.

the 9th of August, but the plaintiff did not give notice of trial; a motion for judgment as in case of a nonsuit in Hilary Term following, was held to be premature." In *Butterworth v. Crabtree*(a), the marginal note was, "Where issue was joined in a country cause, before the sheriff, in June, and no notice of trial was given; held, that a motion for judgment as in case of a nonsuit, in Michaelmas Term, was too early, though two Court days had passed." The fact of an order having been obtained by the plaintiff to try the cause before the under-sheriff could not interfere with the plaintiff's right in respect of the time allowed him for proceeding to trial. In *Wright v. Skinner* (b), it was stated in the marginal note that "where a defendant obtains an order for trial before the sheriff, under the Writ of Trial Act, a judge has no power to impose terms upon the plaintiff, against his consent, as to the time of trial." It was quite clear, consequently, that the mere obtaining the order for the writ of trial did not compel the plaintiff to proceed to trial any earlier than he would have been bound if no such order had been made.

George, in support of the rule, contended that the present case was distinguishable from the last one cited, inasmuch as there the order was obtained by the defendant; whereas here the order had been obtained by the plaintiff. He having therefore thought it right to take such a step in the cause as would enable him to proceed sooner to trial than if he had left the cause to take its ordinary course, he had no right to allow a number of Court days to pass without taking the cause down to trial.

Cur. adv. vult.

WILLIAMS, J.—I cannot distinguish this case from that

(a) Ante, Vol. 3, p. 184.

(b) Ante, Vol. 4, p. 727.

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of *Fox v. M'Culloch* (a), in which it was held by Mr. J. Patteson, after conferring with the other Judges, that a motion for judgment as in case of a nonsuit, under similar circumstances, was too early. I think the present rule must be discharged without costs.

Rule discharged, without costs.

(a) Post, infra.

FOX v. M'CULLOCH.

Where issue is joined in a London cause in Trinity vacation, and no notice of trial given, it is too early to move for judgment as in case of a nonsuit, in the following Hilary Term, although an order had been obtained for trying before the sheriff.

HEATON shewed cause against a rule nisi obtained by *Chilton* for judgment as in case of a nonsuit. Issue had been joined on the 8th August, and no notice of trial was given. On the 25th October a Judge's order was obtained by the plaintiff to try the cause before the under-sheriff. In Hilary Term, the defendant obtained the present rule. It was a London cause. It was now contended, on the authority of *Wingrove v. Hodson* (a), that the application was too early. The marginal note in that case was, "Where the issue was dated in July, and no notice of trial was given; held, that a motion in the next Hilary Term for judgment as in case of a nonsuit, was too early." That case was precisely in point.

Chilton, in support of the rule, contended that under the old practice, the issue in this case being made up in the vacation, would be considered as one of Trinity Term, and as the Uniformity of Process Act had made no difference in the practice upon that point, the present rule could not be considered as too early.

(a) Ante, Vol. 2, p. 379.

PATTESON, J.—I understand the Court of Exchequer has the present question under consideration. I shall await their determination.

Cur. adv. vult.

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WILLIAMS, J. (May the 2nd).—My brother *Patteson*, in this case, heard the arguments last Term. He has considered it, and conferred with the other Judges, and he is of opinion, that notwithstanding the late statute, where issue is joined on the 8th August, and no notice of trial is given, it is too early to move for judgment as in case of a nonsuit in Hilary Term following. The present rule must therefore be discharged, but without costs, as there appears to have been some doubt upon the subject.

Rule discharged, without costs.

RIGBY and Others v. WALTHER.

CROMPTON shewed cause against a rule obtained by *Alexander*, for setting aside the writ of inquiry in this case, on the ground of the improper rejection of evidence by the under-sheriff. It was an action of debt on a bond, brought by the plaintiffs, who were the surviving trustees of the Liverpool Building Society, against the defendant, who was surety for a person named Ford, who had become a member of the society. Breaches were suggested, and the defendant having suffered judgment by default, a writ of inquiry was directed to the sheriff of Lancaster for the purpose of assessing damages on the breaches suggested. On that occasion, the plaintiffs called a person named Mercer, who was the secretary of the society. Being examined on the voir dire, he admitted his having signed the original deed under which the society was formed, and that a share had been given to him, instead of a salary as

A witness, who originally signed the deed of the Liverpool Building Society, and obtained a share, by which he has an interest in its funds, is not rendered competent by exchanging his share for a salary from the society, and cancelling it by the authority of the society, or by releasing his claim on it for salary.

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secretary. In 1884, he stated that the amount of his share being considered insufficient by way of salary, it was agreed, at a meeting of the committee, that for the future, he should be remunerated with a salary of 12*l.* per annum; that he should cease to be a member of the society, and his share cancelled; and from that time he had received his salary only. Reference was then made to the 13th article in the trust deed, in which it was provided that all fines, subscriptions, redemptions, and premiums paid by the members should be considered as joint property, and go to the increase of the general fund. The present action being brought against the surety for the recovery of 12*s.* monthly subscription left unpaid by the principal, it was contended that Mercer had such an interest in the event of the inquiry as disqualified him from giving evidence in favour of the plaintiffs. The under-sheriff was of opinion in favour of the objection. Mercer then executed a release of his salary, and of all claims and demands which he might have in respect of it on the funds of the society. The release recited his discontinuance as a member of the society, and the exchange which had been made between his share and his salary. The under-sheriff was of opinion that this release did not remove the incompetency of the witness; and as no other evidence was tendered on the part of the plaintiffs, the jury found a verdict for only nominal damages. The question was, whether the sheriff was right in rejecting the evidence of Mercer. It was submitted that the direct interest of Mercer was to increase the amount of the verdict, as under the deed he was entitled to a share of its result in common with the other members of the society, unless his interest had been defeated by subsequently occurring facts. None such, however, had occurred in the present case. The mere agreement to exchange his share for a salary of 12*l.* a-year could not alter the effect of an instrument under seal. With respect to the release, that was

equally inefficient for the purpose intended, as it in no way tended to deprive the witness of his interest in the funds of the society. If it operated at all, it operated for the benefit of the witness, because it tended to increase the funds. Besides, it was a release the wrong way; as, to have the operation required, it ought to have been executed by all the members of the society, as to his liability under the deed. He cited *Wilson and Others v. Hirst and Another* (a), *Cheyne v. Koops* (b), *Rex v. Bishop Auckland* (c), *Oxenden v. Palmer* (d), and *Tothill v. Hooper* (e).

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R. Alexander and *Watson* supported the rule, and contended, that although *Mercer* might originally have been incompetent on the ground of interest, as that fact only appeared on the voir dire, it was quite competent for the witness to shew on the voir dire that he had freed himself from his incompetency. The explanation given on the voir dire by the witness clearly shewed that sufficient had been done to deprive himself of all interest, as well as liability, in respect of the society's funds. They cited *Radburn v. Morris* (f), *Goodtitle d. Fowler v. Welford* (g), *Nowell v. Davies* (h), *Paull v. Brown* (i), *Doe d. Hobbs v. Cockell* (k).

Cur. adv. vult.

WILLIAMS, J.—This was an application to set aside a writ of inquiry before the under-sheriff, on an alleged mistake in point of law by the under-sheriff in rejecting the evidence of a witness as incompetent. This inquiry was against the surety of a bond given to the trustees of the

(a) 4 B. & Ad. 760; 1 N. & M. 742.

(b) 4 Esp. 112.

(c) 1 Ad. & El. 744; 1 Mood. & Rob. 286.

(d) 2 B. & Ad. 236.

(e) 1 Mood. & Rob. 392.

(f) 1 M. & P. 648; 4 Bing. 649; 3 C. & P. 254.

(g) Doug. 139.

(h) 5 B. & Ad. 368.

(i) 6 Esp. 34.

(k) 4 Ad. & El. 478.

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Liverpool Building Society when a person named Ford became a member of the society. It appeared that the society was constituted by deed bearing date December 1825. The deed was executed by the trustees, of whom the survivors were the plaintiffs in the action. It was also executed by every member of the society, each of whom covenanted to pay 12s. monthly subscription, and this was to be paid until every member had taken up his share of 120l. There were several provisions in the deed, and among the rest was the 13th, which is material in the present case. It was to the effect, that all fines, subscriptions, redemptions, and premiums paid by the members, were to be considered joint property, and were to go to the augmentation of the general fund, so that it appears that all and every member was interested in the extent and amount of that which was declared to be the joint property of the members. Now, on the writ of inquiry, a person named Mercer was called as a witness for the plaintiffs, and it appears that he was secretary to the society, and that he was employed in that situation at a certain salary. On the voir dire the question was asked whether he was not a member of the society. He said that he had been, and it also appeared that he had been by his signature to the deed. The first question was, whether he, being a member, was interested in the result of the inquiry, as his evidence might affect the amount of the funds of the society, in which all the members were jointly interested. Standing nakedly on that question, it seems to me there is no doubt that, being a member, he was interested in the result of the inquiry. But then it was contended by Mr. *Alexander*, that as this objection was raised on the voir dire, so it might be removed on the voir dire. It is necessary therefore to see if any thing appears on the notes of the under-sheriff to shew that it was removed. He then said that he had signed the deed in 1825; that the share was given him instead of a salary as secretary; that in

1834 it was agreed he should have, in future, a salary of 12*l.* a year, and that he had received that salary since. Now, on that examination, there is nothing to shew that he was not still a member of the society, and therefore it seems to me that this consequence follows—that he was interested in the funds under the 13th rule, which funds were to be affected by the result of the inquiry. Then as to the question of the release alluded to by another witness: it purported to be a release of all claims and demands that Mercer had on the trustees. It recited various circumstances, and among others that Mercer had ceased to be a member of the society. I cannot consider that that recital operated to make him cease to be a member, and I do not think that his interest is extinguished; and its other operation in releasing his demands for his salary is, as was observed in argument, a release the wrong way. It is not a question whether Mercer has acquitted the plaintiffs, but whether he is interested in the fund which by the deed is declared to be for the benefit of all the members of the society. I think, therefore, that the witness Mercer was neither set up on the voir dire, nor does the release remove the objection that he had an interest to enlarge the fund. The under-sheriff was therefore right in point of law.

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The rule was afterwards made absolute on terms.

Rule accordingly.

REX v. HASSELL and Others.

STEER shewed cause against a rule nisi obtained by *Heaton*, requiring the prosecutor of this indictment to shew cause why the defendant should not be discharged

If an indictment against several defendants is removed by certiorari into the King's

Bench without the consent of one, he cannot be compelled to pay the costs of the trial, although he may have appeared and pleaded to the indictment, and been tried on it.

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out of custody on the writ of attachment issued against him, for not paying the sum of 90*l.* 10*s.* 2*d.*, being the amount of costs attending the prosecution of the indictment.

Heaton shewed cause.

Cur. adv. vult.

LITTLEDALE, J.—This was a rule calling on the prosecutor to shew cause why the defendant Sinelair should not be discharged out of custody, as to the writ of attachment issued against him in this prosecution, for his contempt in not paying the sum of 90*l.* 10*s.* 2*d.*, and why the prosecutor should not pay the costs of the application. It appeared that an indictment had been found at the Middlesex Quarter Sessions, against the defendant and a great many others, for a riot and assault. This indictment was removed by certiorari into the Court of King's Bench, upon an affidavit made by Rogers, who is described in the affidavit as the clerk of the attorney of Hassell and the other defendants. On this occasion there would of course be given the usual recognizance under the statute of 5 & 6 W. & M. c. 11, (which was the one then acted upon as to the removal of indictments), by two bail in 20*l.* each, and which among other things is for the payment of costs.

The writ of certiorari on the face of it removes the indictment as to all the defendants, and the recognizance is applicable to all. It is competent for one of several persons indicted to issue a writ of certiorari without the concurrence of the others, and the indictment is then removed as to all the defendants; but then, it is competent for the others, if they wish the indictment to remain in the court where it was found, to apply that the person who removes it shall give security for costs, so as to indemnify those who object to its being removed, or otherwise for a procedendo to issue. The indictment was tried in the

Court of King's Bench, at the sittings after Easter Term, 1834, and the prosecutor proposed that if the defendants would plead guilty, and give up a cross-indictment which had been preferred against the prosecutor, and enter into their own recognizances, he would forego the costs against such of the defendants as should come into that arrangement. This was agreed to by several of the defendants, but Sinclair would not consent to the arrangement, and he was found guilty and sentenced to a month's imprisonment; and the indictment in which he was the prosecutor was tried, and the defendants in that indictment were acquitted. The defendant Sinclair was afterwards taken up on an attachment for non-payment of the costs in respect of the indictment in question, and he now applied to be discharged from that attachment, on the ground that the indictment was removed at the costs and charges of Hassell, and that Sinclair was a total stranger to the proceedings, and that no communication was made to him of Hassell's intention to obtain the certiorari, and that the certiorari was applied for and obtained without the knowledge, privity, or consent of Sinclair. There is no distinct affidavit that he did not concur in applying for it, though he appeared and took his trial, and it is not stated that he ever objected to the removal; yet he was compelled to appear and plead, and go to trial, and could not help himself, and could not have had a procedendo, if at all, unless at a very great expense. It appears to me, on the whole of the case, that this indictment must be taken to be removed without the knowledge of Sinclair, and though the prosecutor did not know that to be the case, and that therefore he was entitled to issue the attachment for the costs, yet when the fact is made to appear that Sinclair was ignorant of the certiorari being applied for, I think that no further proceedings ought to be taken upon the attachment, and that the defendant Sinclair is entitled to be discharged out of custody. But there is no ground for

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making the prosecutor pay the costs of the application. There is no hardship in the prosecutor losing this remedy for his costs; he has discharged the other defendants, and thereby thrown the whole costs on Sinclair; and though each is liable for the costs, yet, if the others had been found guilty they would probably have come to some arrangement to pay the costs among them. No action is to be brought in respect of Sinclair having been imprisoned on the attachment.

Rule absolute accordingly.

COLBRON v. HALL.

If a prisoner is supersedeable, in consequence of the plaintiff not charging him in execution in due time, pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 85, the lapse of time is no answer to an application for his discharge.

As against a prisoner, a final judgment is complete at the time of signing, without carrying in the roll.

As against prisoners, 3 Reg. Gen. H. T. 4 Will. 4, abolishes the doctrine of relation, so as to prevent them from reckoning the term previous to a vacation, in which final

judgment is signed, as one of those within which a plaintiff must charge in execution, so as to prevent the defendant from becoming supersedeable.

BUTT shewed cause against a rule nisi obtained by *Knowles* for the discharge of the defendant out of the custody of the sheriff of Middlesex on the ground of the plaintiff not having proceeded duly to charge him in custody pursuant to the provisions of 1 Reg. Gen. H. T. 2 Will. 4, s. 85 (a). It was an action of debt, and the plaintiff declared in Michaelmas vacation, on the 27th November, 1834. The defendant did not plead in due time, and the plaintiff signed judgment for want of a plea on the 22d December, in the same year, the Michaelmas vacation still continuing. The plaintiff completed his judgment by taking in the roll in Easter Term on the 5th May. Execution was sued out on the 7th of that month. In Michaelmas Term the present application was made for the discharge of the defendant. The determination of the present question would depend on the construction which the Court should think it right to put on the words of 1 Reg. Gen. H. T. 2 Will. 4, s. 85. There were four objections to the present application. The first was that

(a) Ante, Vol. 1, p. 194.

the application was too late. Supposing the defendant not to have been charged in execution in due time, that could only amount to an irregularity, and if the defendant sought to avail himself of it, he ought to come within a reasonable time, according to the directions of 1 Reg. Gen. H. T. 2 Will. 4, s. 33 (a). Here, however, an application in Michaelmas Term could not be considered as sufficiently within a reasonable time. He cited *Smith v. Sandys* (b). Secondly, according to the language of the rule, the defendant had been charged in execution in due time, because the judgment could not be considered as complete until Easter Term, the roll not having been carried in till then. The words of the rule were, "the plaintiff shall proceed to trial, or final judgment, against a prisoner, within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." The judgment of course must mean a complete judgment, but it was not complete until Easter Term; and the admitted facts shewed that he had been charged within two terms after such judgment. He cited *Blackburn v. Kymer* (c), and *Butler v. Bulkeley* (d). Thirdly, if the judgment were to be considered as final in December, then this particular case did not come within the rule, because the last clause of it only applied to cases where a trial had taken place. Here, however, no "trial" had taken place, for the defendant had suffered judgment by default. That being the case, the plaintiff was entitled to two clear terms within which to charge the defendant in execution. Fourthly, it could not be said that the judgment in December related back to Michaelmas Term, because the express words of 3 Reg. Gen. H. T. 4 Will. 4,

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(a) Ante, Vol. 1, p. 187.

(b) 3 Ad. & El. 693.

(c) 5 Taunt. 672; 1 Marsh. 278.

(d) 8 Moore, 104.

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(Pleading Rules)(a) provided that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: Provided that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc." Even therefore, supposing the judgment ought to be considered as complete in the month of December, as the day in December on which it was signed could only have relation to that day, the plaintiff had in due time charged the defendant in execution, as he had been charged in Easter Term. He cited *Borer v. Baker* (b), *Melton v. Hewitt* (c), *Lambirth v. Barrington* (d), *Heaton v. Wiltaker* (e), and *Smith v. Jefferys* (f).

LITTLEDALE, J., stopped *Knowles* as to the first and second objections taken by *Bull*.

Knowles, in support of the rule, contended with respect to the third objection, that when the rule of H. T. 2 Will. 4, was made, there could be no occasion to introduce the word "trial" into the latter clause of the rule, because at that time, if a judgment were signed in vacation, it related back to the previous term. As to the last point, the rule of H. T. 4 Will. 4, with respect to the doctrine of relation, only contemplated the protection of purchasers whose rights were not to be affected by the relation of a judgment to the previous term. For these reasons he submitted that the present rule ought to be made absolute.

LITTLEDALE, J.—I will take time to look into the authorities on these questions, as some of them are new.

Cur. adv. vult.

(a) Ante, Vol. 2, p. 313.
 (b) Ante, Vol. 2, p. 608.
 (c) Ante, Vol. 2, p. 71.

(d) 2 Bing. N. C. 149.
 (e) 4 East, 349.
 (f) 6 T. R. 776.

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LITTLEDALE, J.—This was an application to discharge the defendant out of custody for want of being charged in execution in due time. The declaration was dated the 27th November, 1834, and final judgment in debt was signed in Michaelmas Vacation, on the 22nd December, 1834. Judgment was completed on the 5th May, 1835, which was in Easter Term. The defendant was charged in execution in the same Easter Term, on the 7th May, 1835. It was objected, first, that the defendant came too late; that this was a mere irregularity, on which it behoved a party to apply promptly, and though greater indulgence might be shewn to a prisoner than other persons, yet this was undoubtedly too long a time. As to that, I am of opinion that it is not an irregularity. It is a violation of a rule of Court not to charge a prisoner in execution in the prescribed time, and it is a well-known established rule, that a prisoner once supersedeable for want of being charged in execution on judgment always continues so. Tidd's Practice (a), fully explained by Mr. Justice Bayley in *Melton v. Hewitt* (b). The second objection was, that the judgment was not completed till Easter Term, 1835, and if so, he was charged in execution in due time; but I am of opinion that a judgment was completed in Michaelmas Vacation, 1834. Final judgment was then signed, and the plaintiff might then have waived his costs, and sued out execution immediately for the debt. The next objection was, that upon the construction of the two rules of H. T. 2 Will. 4 and H. T. 4 Will. 4, the plaintiff was in time in charging him in execution in Easter Term, 1835. It may be proper to advert to the old rule of H. T. 26 Geo. 3. The language of that rule is, "In all cases after such trial shall be had, or final judgment obtained against any prisoner in the custody of the marshal, or in any other gaol or prison, unless the plaintiff shall cause such prisoner

(a) 9th ed. 367.

(b) Ante, Vol. 2, p. 71.

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to be charged in execution within two terms next after such trial shall be had or final judgment obtained, of which two terms, the term in which such trial shall be had or final judgment shall be obtained shall be taken to be one, in case no writ of error shall be depending, nor injunction be obtained for stay of proceedings." By the rule of H. T. 2 Will. 4 (a), "The plaintiff shall proceed to trial, or final judgment against a prisoner, within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." By rule of H. T. 4 Will. 4 (b), "All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day." This is a parliamentary rule, and has the force of an act of Parliament, and shuts out all relation to the preceding term; and therefore a judgment in Michaelmas Vacation cannot be taken as a judgment of Michaelmas Term; and this judgment having been signed in December, 1834, is affected by it, and cannot be taken to be a judgment as of Michaelmas Term; and then, according to the rule of H. T. 2 Will. 4, the plaintiff has two terms after that to charge the defendant in execution. It is a very hard case, and the consequences probably not contemplated when the rule was made, and that may cause the Court to make a new rule. This rule, however, may be enlarged, in order to take the opinion of the full Court, if Mr. *Knowles* thinks proper, as it is the case of a prisoner.

Rule enlarged accordingly (c).

(a) Ante, Vol. 1, p. 194.

(b) Ante, Vol. 2, p. 313.

(c) *Knowles* did not afterwards apply to the full Court.

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REX v. RATTISLAW.

WADDINGTON shewed cause against a rule which had been obtained for quashing a writ of certiorari for bringing up an order of the justices of Warwickshire, which had been made by them at the Midsummer Quarter Sessions, 1836, in the matter of an appeal against the overseer's accounts of the parish of Rugby. The ground on which the application had been made was, that before obtaining the certiorari notice of an application for that purpose had only been served on one of the justices present at the sessions when the appeal was heard, and to another justice who had not been present. On the 18th October the certiorari was delivered to the Court. The first objection to the certiorari was, that the 13th Geo. 2, c. 18, s. 5, had not been complied with in serving two of the justices who had made the order with notices of the application. Sufficient notice, however, had been given by serving two justices of the county, because the order was made by the justices of the county. The mere fact of one of the justices served being present or absent at the time of making the order, must be immaterial. But if the notice were insufficient, it was too late to take the objection now, as it should have been taken when the rule nisi for the certiorari was granted. If the present rule were made absolute, great injustice would be wrought, for in consequence of the delay in applying to set aside this writ, the six months within which a writ of certiorari must be sued out would have elapsed, and thus the parties would be prevented from having the question tried, if the Court should be of opinion that the writ ought to be quashed. But another objection might be taken to this application, which was, that it did not appear the persons making it were interested in the matter of the appeal. He cited *Daniel v. Phillips* (a).

In order to obtain a certiorari, it is not sufficient to serve the notice, under 13 Geo. 2, c. 15, on one justice present at the sessions making the order, and another justice of the same county not present.

It is not necessarily too late to object to the service of the notice after writ issued, although the consequence may be, that if the writ be quashed, it will be too late to sue out a fresh one.

It is competent for the parties in an appeal to object to the notice to justices previous to obtaining a certiorari.

(a) 4 T. R. 499.

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Miller and *Daniel* supported the rule, and contended that the words of the 13 Geo. 2, being imperative as to serving two of the justices who had made the order, it was clear that the provisions of the act had not been complied with, since it could not be said that the order had been made by the justice who was absent at the time of making it. The case of *Rex v. The Justices of Sussex* (a), was in point to shew that the provisions of the act must be strictly complied with. With respect to taking the objection at the time when the rule nisi for the certiorari was discussed, there was nothing to shew that any rule nisi had been obtained previous to issuing the writ. As to the application being late, they cited *Rex v. Wakefield* (b), *Rex v. Justices of Kent* (c), and *Rex v. Nicholls* (d): Lastly, with regard to who the persons were at whose instance the application was made, the case of *Daniel v. Phillips* did not apply, as in the present instance the persons making it were those interested in the event of the appeal.

Cur. adv. vult.

PATTESON, J., this term (April 26) gave judgment.—This was a case argued last term on a rule to shew cause why a certiorari should not be quashed. The certiorari was to remove an order of quarter sessions. The writ had been issued, and the motion for quashing it was made on the ground that the original notice of the application for the certiorari was incorrect, as it had been wrongly served. The notice had been served on one of the justices who was present at the hearing of the case by the Court of Quarter Sessions, and on another justice who was not present. Now, the statute 13 Geo. 2, c. 15, provides that no writ of certiorari shall be granted unless it be duly

(a) 1 M. & Sel. 631.

(b) 1 Burr. 488.

(c) 3 Barn. & Ad. 250.

(d) 5 T. R. 281, n.

averred on oath that the said party or parties suing forth the same hath or have given six days notice thereof in writing to the justice or justices, or to two of them, by and before whom such condition, judgment, order, or other awardings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or quashing such certiorari. The contention on this rule was, whether the notice had been sufficiently served within the meaning of that act. Mr. *Waddington* argued that it had been; and was obliged to contend that it would have been sufficient to have served it on any two justices of the county. That is a very strong proposition. I have not been able to find any authority on the point; yet, I am satisfied that the meaning of the act is, that the service should be on two of the justices by whom the order was made, and who were present at the time. In this case, one of those served was not present, and therefore I think the service was bad. There were several other objections argued, which it is not necessary to determine, as the rule must be made absolute on this point. There was one objection made to the present rule, that at all events it was now too late to make this objection to the service of the notice. On the other hand, the case of *Rex v. Nicholls* was cited, and on the authority of that case (without deciding that in all cases such a motion may be made after any lapse of time,) I think this motion was not too late. In that case a rule nisi for a certiorari was obtained in Hilary Term, no notice having been given to the parties before obtaining the rule. The rule was obtained on the 3rd February, was served and made absolute on the 10th, no cause being shewn; so that more than six days elapsed between the time of moving for the rule and making it absolute. In Easter Term following a motion was made to quash the certiorari, but the Court said the practice had been to give the notice before moving for the rule nisi.

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Now, though it does not appear from the report of the case, that the objection of the motion having been made too late was made, yet is clear that it must have been, and the Court said that the rule nisi was not notice to the justices, and then quashed the certiorari. That case, therefore, is directly in point, and this rule must be made absolute. There was another objection made that it was not competent to the respondents in the appeal to object to the sufficiency of the notices to the justices. But I cannot tell but that they (the justices) may be injured, and may have wished to support their own order. However, the objection being brought under the notice of the Court, I am bound to deal with it.

Rule absolute.

CLAYTON v. MARSHAM.

A declaration by the defendant, that he will keep out of the way to avoid being served, does not waive the necessity of complying with the practice of making three calls, &c. in order to obtain a distringas.

HELPS applied for leave to sue out a writ of distringas against the defendant, with the view of compelling him to enter an appearance. The affidavits with which he was furnished did not shew that the usual course of practice had been adopted, which the courts had recognised as the general practice in such cases. They only stated that two calls had been made at the defendant's residence, instead of three. A copy of the writ of summons was left at the second call. It was, however, sworn that the defendant, speaking of the present action, had said he would take very good care he should not be served with any writ. Under these circumstances, it was suggested that, as the principle on which this writ was granted was the fact of the defendant keeping out of the way to avoid being served, that was sufficiently clear from the declaration, which the defendant was sworn to have made, as to avoid-

ing service. The cases of *Hill v. Moule* (a), *White v. Western* (b), and *Hickman v. Dallimore* (c), were cited.

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WILLIAMS, J.—There is no reason why a third call should not have been made in this case, according to the ordinary practice, and the copy of the writ left at that time. I think the plaintiff is not entitled to his writ.

Rule refused.

(a) Ante, Vol. 2, p. 10; 1 Cr.
& Mee. 617; 3 Tyr. 162, n.

(b) Ante, Vol. 2, p. 451.
(c) Ante, Vol. 4, p. 278.

CAREW v. WINSLOW.

R. ALEXANDER moved to make a rule absolute on affidavit of service. It was a rule to compute principal and interest on a bill of exchange. The peculiarity in the case was, the special nature of the service disclosed by the affidavit on which the application was founded. The deponent swore, that he had taken the rule nisi to the chambers of the defendant, and finding no one there, put it into the letter-box. The deponent called the next day, and on making inquiries of a person resident in the chambers, he informed him that he had found the rule in the box, and had sent it to the defendant. It was contended that this ought to be considered a sufficient service of such a rule.

It is a sufficient service of a rule to compute, if it is left at the chambers of the defendant, and a person resident there states his having transmitted it to him.

WILLIAMS, J.—I think the service is sufficient to entitle you to make the rule absolute.

Rule absolute.

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Under special circumstances, the Court will allow a writ of *distringas*, to compel an appearance, to be issued against a defendant, although his residence cannot be discovered, the usual service of the writ of summons by calls and appointments having been effected at his two last known places of abode, and on an agent for the receipt of his rents, who stated himself to be in communication with his principal.

GRINDLEY v. THORN.

CHILTON applied for leave to issue a *distringas* in order to compel an appearance. It was an action to recover compensation in damages for criminal conversation with the plaintiff's wife. At the time that the connexion took place, the defendant was living in the house of the plaintiff. He subsequently eloped thence with the plaintiff's wife, and went to reside for a short time in lodgings, whence he had removed, and his residence had never been discovered since. Inquiries had been made at those lodgings, but no trace of him could be found. He was afterwards advertised in several newspapers, and various other endeavours were made in order to discover him, but unsuccessfully. It was afterwards, however, ascertained that a person named Lee was in the receipt of certain rents belonging to the defendant, and accordingly application was made to him to gain some information with respect to his employer. That person refused to state where his employer was, but offered to send to him any thing which might be left. Under these circumstances, an application was made in last Hilary Term to be allowed to serve the writ of summons on Lee, or else for a *distringas*. Mr. J. *Patteson* (a), however, refused to grant the application. Since then, three calls had been made on Lee, and a copy of a summons left at his house. A similar course had been adopted at the defendant's lodgings, to which he had gone after leaving the plaintiff's house, and also at the plaintiff's house, that having been the last place of abode at which he had been seen. The affidavits on which the application was founded, also stated that it was believed the defendant was keeping out of the way to avoid the service of process. Under these circumstances, it was

(a) Ante, p. 383.

submitted that the provisions of sect. 3 of 2 & 3 Will. 4, c. 39, were sufficiently complied with, so as to entitle the plaintiff to a *distringas*. All that that section required was, that it should be shewn that the defendant has not, according to the exigency of the writ, "appeared to the action, and cannot be compelled so to do without some more efficacious process."

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COLERIDGE, J.—The difficulty I feel is, that it may be unjust to the defendant to grant this application, as he may have been abroad previous to the commencement of the action.

Chilton cited the case of *Moon v. Thynne* (a), where the Court allowed a *distringas* to issue against a defendant, though he had not been served with the writ, it appearing that he had gone abroad in order to avoid his creditors, and had left servants at his house in town. The object which the plaintiff had in the present case was to obtain a verdict against the defendant, with the ultimate view of procuring a divorce. Proceedings to outlawry would consequently be of no avail. Under these circumstances, it was hoped, that the plaintiff had brought himself within the terms of the statute, by making out a case which would induce the Court to exercise its discretion in granting leave to the plaintiff to issue a writ of *distringas*.

COLERIDGE, J.—You may take your writ.

Writ granted.

(a) Ante, Vol. 3, p. 153.

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BONNEFOR v. RUSSEL.

In an application to stay proceedings on the bail-bond, the affidavit of merits, if made by an attorney, must describe him as the attorney to the defendant; and it is not sufficient to shew by other affidavits that there is an attorney of the same Christian and surname residing at the same place as that of which the deponent describes himself.

BARSTOW shewed cause against a rule nisi obtained by *Humfrey*, for staying proceedings on the bail-bond on payment of costs. He objected to the affidavit of merits, on the ground of the insufficient description given of himself by the deponent, who made the affidavit. He described himself as "William Russel, of No. 7, Norfolk-street, Strand, gentleman." It did not therefore appear, that though he might be an attorney, he was the attorney of the defendant in the action. Unless he was, there was nothing to shew such a connexion between him and the cause as would enable him to know whether the defendant had or had not a defence on the merits. It was true that one affidavit, on which the application was founded, described the deponent as "Clerk to Howard & Russel, of No. 7, Norfolk-street, Strand, attornies for the defendant." Another affidavit also shewed that William Russel, who resided at the same place, had acted as attorney for the defendant. These statements, however, he contended, could not be used for the purpose of making out that which ought properly to have been stated in the affidavit of merits. He cited *Morris v. Hunt* (a), the marginal note of which was, "Affidavits of merits must appear to have been made by the defendant or his attorney or agent."

Humfrey, in support of the rule, submitted that the affidavits on which he had obtained the rule sufficiently disclosed the fact, that the person making the affidavit was the attorney for the defendant. The only object which the Court had in requiring such a description of the

(a) 1 Chit. Rep. 97.

deponent in the affidavit, was to ascertain that the person who swore to merits was sufficiently acquainted with the case to have a competent knowledge, whether the defendant had merits or not. That object was sufficiently obtained if such affidavits were laid before the Court as shewed the person making the affidavit to have a competent knowledge of the merits.

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COLERIDGE, J.—Nothing which appears in these affidavits is inconsistent with the supposition that there is another person of the same christian and surname resident at No. 7, Norfolk-street, but who is not the defendant's attorney. Affidavits should conform strictly to what the practice of the Court requires. The present rule must therefore be discharged.

Rule discharged.

LAMBERT and Another v. COOPER and Others.

THIS was an interpleader rule, obtained under 1 & 2 Will. 4, c. 58, s. 1.

Addison, on the part of the plaintiffs, stated that the claimant did not appear. It was an action brought by the assignees of a person named Walker, a bankrupt, and the facts out of which the present application had arisen were these. A quantity of cloth had been sold by Walker, through the agency of a factor named Wise, in the name of the latter, to the defendants. Walker then became bankrupt. The present action was brought by the assignees against the defendants. A claim was made after action and before plea on the part of the assignees of Wise, who had also become bankrupt. The defendants did not dispute their liability to pay one or other of the parties claiming the property, and therefore

On an application under the first section of the Interpleader Act, if the claimant does not appear, the Court will not order him to pay the costs of applying to the Court, or such costs to be paid out of the fund in dispute.

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they applied to the Court for the usual rule under the first section of the Interpleader Act. As the claimant did not appear, the mode in which the rule must be disposed of would be, that the claim of the third party should be barred, proceedings in the action stayed on payment of debt and costs, each party paying his own costs of appearing on the rule. It was a matter of doubt, whether the Court had power to order the claimant, who did not appear, to pay the costs of those parties who had come before the Court upon the rule. By the third section of the act it was provided "that, if such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable." It would seem, therefore, that if the claimant did not appear, the Court had no power to award costs as against him, the only case with respect to costs contemplated by that section being as between the defendant and the plaintiff. The case was different from that, in which the application was made under the sixth section of the act, for there, it was provided that "the costs of all such proceedings shall be in the discretion of the Court." The most correct course, therefore, would be, that each party should pay his own costs.

Swann, who appeared for the defendant, submitted that the funds in the hands of the defendant ought to be made

available for the payment of the costs incurred by his client in applying to the Court. The defendant, being a mere stakeholder, and claiming no interest whatever in the matter disputed, ought surely to have the costs of applying to the Court with respect to the matter so disputed. He cited *Cotter v. The Bank of England* (a), *Parker v. Linnett* (b), *Duear v. Mackintosh* (c), and *Scales v. Sargeson* (d).

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WILLIAMS, J.—All the facts are agreed upon in this case, and the principle also, with this exception, that the applicant claims to have the costs of this rule paid out of the fund in dispute. The applicant, however, has overlooked the beneficial situation in which he is placed by the Interpleader Act. If that act had not been passed, both the present plaintiff and the person who has made the claim might have proceeded against him, and he would have had no relief except by the expensive mode of proceeding in equity. Now, although he has done nothing wrong, he is relieved by this summary and cheap application. He has, therefore, a great benefit conferred on him. But why is the fund in dispute to be diminished? what harm has the original vendor of these goods done? If there is any delinquent, it is the person who has put forth an idle claim; but he is not before the Court, and it may be doubtful if the Court can award costs against him. If he were here I would undoubtedly, if I had power, allow the costs against him. There can, consequently, be no costs allowed to the applicant out of the fund in dispute. If a fresh application is made to the Court, to order the person who made the claim to pay the costs of this rule, as to the power to do which I give no opinion, that question

(a) Ante, Vol. 2, p. 728.

(b) Ib. p. 562.

(c) Ante, Vol. 2, p. 730.

(d) Ante, Vol. 4, p. 231.

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may then be discussed. The rule must be that the claimant be barred of his claim, and that the action be stayed on payment of the debt and the costs of the action: each party paying his own costs on this rule..

Rule accordingly.

DALTON v. TUCKER.

To bring a party into contempt for non-payment of costs, pursuant to the Master's allocatur, a copy of the rule and allocatur must be left with the defendant.

BERE applied for an attachment against the defendant for non-payment of costs pursuant to the Master's allocatur. The difficulty in the case was, that although the service was regular in other respects, the person effecting the service had omitted to leave a copy of the rule with the defendant. Shewing the original, and making the demand however, must have brought the contents both of the rule and allocatur to the mind of the defendant, and his disobedience to it therefore amounted to a contempt. Leaving a copy with the defendant could not be of any advantage to him.

WILLIAMS, J.—That is not sufficient; in order to bring the party into contempt, a copy must be left.

Rule refused.

POWELL v. DUNCAN.

When a rule nisi has been obtained for leave to plead coverture puis darrein continuance, the ground of the plea having arisen more than eight days

THESIGER moved to make a rule absolute on affidavit of service, no cause being shewn. It was a rule nisi calling on the plaintiff to shew cause why the defendant should not be at liberty to plead the plaintiff's coverture puis darrein continuance. It was an action on the case for darkening ancient windows of the plaintiff. The defend-

before the time of pleading, the Court will not, without consent, introduce into the rule the term that the affidavit of verification required by 2 Reg. Gen. H. T. 4 Will. 4, shall be dispensed with.

ant pleaded Not guilty, and notice of trial was given for the sittings after last Hilary Term. The cause, however, had not yet been tried. A few days antecedent to the 22nd April, it being rumoured that the plaintiff had married, the present rule was obtained on that day. It had previously been ascertained that a marriage did take place between her and a man named Bush, on the 3rd of the same month. This application was rendered necessary by a proviso introduced by 2 Reg. Gen. H. T. 4 Will. 4, (a) (Pleading Rules). This rule, after generally abolishing the entering of continuances, provided "that in all cases in which a plea puis darrein continuance is now by law pleadable in banc, or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose, after the last pleading, or the issuing of the jury process, as the case may be." It then provided still further, "that no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a Judge shall otherwise order." The present application therefore was made to be allowed to plead the coverture as before mentioned. No cause was shewn against the rule, and it was now sought to introduce the term of dispensing with the affidavit that the ground of the plea arose within eight days before the pleading of the plea. The rule, in its present form, was merely to be allowed to plead it, notwithstanding it had arisen more than eight days before the plea was pleaded.

WILLIAMS, J.—That term cannot be introduced into the rule as it at present stands. It ought to have been made part of the rule when it was obtained. If it had been introduced originally, it is possible that the plaintiff would

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(a) Ante, Vol. 2, p. 313.

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have shewn cause against it. I can only make the rule absolute in its present terms ; if any modification of them is required, another application must be made.

Rule absolute accordingly.

DOE *d.* LORD SUMMERS *v.* ROE.

Where tenants lock themselves up in the premises sought to be recovered, and access cannot be had to them, it is a sufficient service for a rule nisi to put the declaration under the door, and explain it aloud outside.

KELLY moved for leave to sign judgment against the casual ejector on an affidavit of service, which stated that the deponent had been unable to effect a service on two of the tenants of the premises sought to be recovered, in consequence of their shutting themselves up in the houses and refusing to open the doors. Copies of the declaration had been pushed under each door, and an explanation in a loud voice given outside. All therefore had been done that was possible, in order to effect a service.

WILLIAMS, J.—With respect to those tenants, I think you may take a rule nisi, and let it be served in the same way as the declaration.

Rule nisi accordingly.

DOE *d.* MATHER *v.* ROE.

Where the tenant goes abroad, and it does not appear when he will return, the Court will grant a rule nisi for judgment against the casual ejector, when the service has been effected at the premises, on a servant of the tenant.

BUTT applied for judgment against the casual ejector. The affidavit on which his motion was founded stated the deponent to have gone to the premises in question, where he had found a servant of Sir George Pocock, the tenant of them. On making inquiries of the servant he stated that Sir George Pocock had gone away, and was at that time resident in France. In general, the Court would not allow judgment to be signed against the casual ejector

when the servant only of the tenant had been served. Those were, however, cases where the tenant of the premises remained in this country. In the present instance, Sir George Pocock had gone abroad, and there was nothing to shew at what time he would return. The case consequently did not come within the principle of those in which the Court had refused to interfere. It was therefore submitted, that judgment might be signed against the casual ejector.

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WILLIAMS, J.—I think you may have a rule nisi for judgment.

Rule nisi granted.

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DAVISON applied for judgment against the casual ejector. The service was not strictly regular. It appeared, by the affidavit of the deponent endeavouring to serve the declaration, that he had gone to the premises and inquired for a person named Cooper, that being the name of the tenant in possession. A person appeared at the door, who said his name was Cooper. The deponent then served that person with the declaration and explained the notice in the regular way. The person so served then said that the paper must be intended for a Mr. William Henry Cooper, who was from home, but that his own name was William Cooper. The deponent then made inquiries at the adjoining house, and described the man he had served to the person resident there. The latter then said that he had no doubt the person who had received the declaration was William Henry Cooper, the tenant in possession, whom it was sought to serve.

Where there is reason to believe that the person served is the tenant in possession, although he denies it, the Court will allow judgment to be signed.

WILLIAMS, J.—I think you may take your rule.

Rule granted.

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FACER v. FRENCH and Another.

Where a pauper plaintiff gave notice of trial, and, on the second day of the Assizes, withdrew his record, on the ground of its requiring amendment, the Court dispaupered him.

CHADWICK C. JONES shewed cause against a rule nisi obtained by *Chilton* for dispaupering the plaintiff, on the ground of his having vexatiously given a notice of trial on which he did not act. It was an action of trespass, and notice of trial was given for the last Hertford Spring Assizes; but the cause was withdrawn on the second day of the assize. It was in respect of this default, that the present application was made. In answer to it, the plaintiff's attorney had made an affidavit, that when he went to the assize town he had a consultation with his counsel, who expressed his opinion that the plaintiff could not safely proceed to trial without amending the record. In consequence of this advice, the record was withdrawn. This was the reason of the plaintiff not proceeding on his notice, and could by no means be considered as vexatious. Unless it was clearly so, the Court would not be inclined to make the present rule absolute, since the effect of it would be to deprive the plaintiff of an opportunity of obtaining justice.

Chilton, in support of the rule, contended that the affidavit produced on the other side by no means afforded a satisfactory answer to the present application. It did not disclose what the nature of the amendment necessary in the record was; nor did it shew that any application had been made to the Judge at the assizes, for the purpose of effecting the amendment; nor was it shewn that any application had been made to the other side for the defendant's consent to the amendment. The present rule ought, therefore, to be made absolute.

WILLIAMS, J.—I think, in this case, that the plaintiff has acted vexatiously, in not proceeding to trial pursuant

to his notice. If he had thought proper to apply to the Judge at the assizes for leave to amend, he might have directed it to be made upon such terms as appeared to him just. Instead of that, he thought proper merely to withdraw the record, after putting the defendant to the inconvenience and expense of bringing his witnesses down to the assizes. Under these circumstances, I think that I am bound to make the present rule absolute for dispaupering the plaintiff.

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Rule absolute.

BONNEFOR v. RUSSEL.

BARSTOW shewed cause against a rule nisi obtained by *Humfrey*, calling on the plaintiff to shew cause why he should not give security for costs on the ground of his being abroad. The defendant had originally been arrested, and had given a bail-bond to the sheriff. He did not, however, perfect bail in due time, and an assignment of the bail-bond was taken. The plaintiff commenced proceedings upon the bond, and the defendant afterwards put in and perfected bail. An application was then made to set aside the proceedings on the bail-bond on payment of costs. Before this rule was disposed of, and while the proceedings on the bond were pending, the present rule was obtained. It was now contended that the application for security for costs was premature. Before making that application, the defendant should have duly purged his contempt in not duly justifying his bail by putting in and perfecting bail, and setting aside the proceedings on the bail-bond. Until he had so done, he was not in a situation to make the present rule absolute. At present it could not be known, whether the plaintiff intended to proceed in the original cause or on the bail-bond. He had taken an assignment of it, and might, if he thought

While proceedings on the bail-bond are pending, the defendant cannot obtain security for costs from the plaintiff in the original action, although bail has been perfected since the assignment of the bond.

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proper, continue his proceedings upon it ; but he could not proceed both on the bail-bond and in the action.

Humfrey, in support of the rule, contended that it was unnecessary for the defendant to wait until the proceedings on the bail-bond were stayed, before he made the present application. He had perfected bail above, and was therefore in Court. Under those circumstances, it was a mere matter of course to stay proceedings on the bail-bond on payment of costs. The mere fact of a formal proceeding of this sort not being taken by the defendant could not interfere with his right to require the plaintiff to find security for costs, he being abroad. The practice of the Court required that such applications should be made promptly, and if they were not, the Court always refused them ; but in the present case, as soon as the defendant had perfected his bail, and thus brought himself into Court, he had applied for this security. If he had not applied thus early, but had waited until the rule for staying proceedings on the bail-bond was disposed of, it would be said that the defendant had been guilty of laches, and was therefore not entitled to have security for costs.

COLERIDGE, J.—What I have to consider is, whether the defendant is sufficiently in Court for the purpose of making this rule absolute. In consequence of the defendant not perfecting his bail above in due time, an assignment of the bail-bond has been taken, on which proceedings have been commenced, and which are now pending. During that pendency, the defendant makes the present application. He has no right to make such an application, and therefore the present rule must be discharged.

Rule discharged.

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ROWBOTHAM *v.* DUPREE.

R. V. RICHARDS shewed cause against a rule nisi, obtained by *J. Jervis* for setting aside a regular interlocutory judgment on payment of costs. He objected to the affidavit of merits on which the application was founded, on the ground that it did not appear from the description which the deponent gave of himself, that he was sufficiently acquainted with the defendant's case to enable him to speak of its merits. He described himself as clerk to the defendant's attorney. This was insufficient, according to the case of *Morris v. Hunt* (a), where it was held that an affidavit of merits must appear to be made by the defendant, his attorney, or agent. Here it was made by neither. At any rate, the clerk should have shewn that he had the management of the cause, in which his master was the attorney. Otherwise, he appeared to be a mere stranger to the proceeding.

An affidavit of merits, in support of an application to set aside a regular judgment, must appear to be made either by the defendant, his attorney, or agent, or some person who has had such a connection with the cause as acquaints him with its merits.

J. Jervis, in support of the rule, contended that it sufficiently appeared, from the contents of the affidavit, that the deponent had been concerned in the management of the cause. The spirit therefore of the rule was sufficiently complied with. Under any circumstances the affidavit might be amended and resworn.

WILLIAMS, J.—In cases where an affidavit of merits is required, the usual course is, that it should be made either by the defendant, or his attorney or agent; and if it is not made by one of them, it must be made by some one who has a sufficient knowledge of the case to enable him to speak as to its merits. In the present instance, the deponent does not describe himself as managing clerk,

(a) 1 Chit. Rep. 97.

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or as a person who has had the management of the cause. I think, therefore, that this affidavit is not sufficient. I ought not to allow the affidavit to be amended and re-sworn, for that would be only offering an inducement to persons to make careless affidavits. The present rule must therefore be discharged with costs.

Rule discharged, with costs.

STORY v. HODSON.

The Court has no power to deprive a plaintiff of his costs in an action tried before the sheriff, where he has recovered a less sum than 40s.

W. H. WATSON shewed cause against a rule nisi obtained by *Armstrong*, for the purpose of depriving the plaintiff of costs on the ground of his having recovered less than 40s. : It was an action tried before the under-sheriff of Cumberland. The declaration was for money lent and on an account stated. The pleas were the Statute of Limitations and a set-off. The jury found a verdict for the plaintiff to the extent of 1*l.* 13*s.* 9*d.* only. The present application was then made to deprive the plaintiff of his costs, on the ground of his having a sum less than 40*s.* With respect to the Court depriving a plaintiff of costs on that ground, it has no power so to do, except under the statute of the 43 Eliz. c. 6, s. 2. The words of that section, however, gave the power only to "the judges and justices before whom any such action shall be pursued." Here, the cause was tried before the under-sheriff, and it had been held in the cases of *Wardroper v. Richardson* (a), and *Claridge v. Smith* (b), that the judge of an inferior court to whom a cause is sent by a writ of trial, cannot certify under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, where a sum less than 40*s.* is recovered.

(a) 1 Ad. & El. 75; 3 N. & M.
 839, S. C.

(b) Ante, Vol. 4, p. 583.

In order, therefore, that this application should succeed, recourse must be had to some supposed jurisdiction of the Court, independent of the statute of Elizabeth, to deprive a plaintiff of his costs when he recovers a sum less than 40s. That no such power, however, existed independent of the act, clearly appeared from the mere circumstance itself of the legislature passing the act, and from the numerous applications which had been made under it on the behalf of defendants. The Court would not be disposed therefore to make a precedent, for which, no authority could be cited.

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Armstrong, in support of the rule, admitted that the sheriff had no power to certify under the statute; but the Court having a general superintendence over all causes brought in it, must surely have power over the costs attending them.

Cur. adv. vult.

WILLIAMS, J.—This was an application to take away from the plaintiff his costs, on the ground that, on the trial before the sheriff, a sum under 40s. had been recovered. This application is made on the assumption,—and it seems to me that is a clear assumption,—that the sheriff has no power to certify to deprive the plaintiff of his right to costs. It is also clear that a certificate under the statute of Elizabeth, to deprive the plaintiff of his costs, is a certificate which is not to be given by the Court, but by the Judge who tries the case. This application, therefore, is to the general superintending power of the Court over the cause, and consequently over the costs, as the sheriff who tried the case has no power to grant the certificate. I was not furnished during the argument with any authority, nor am I aware of there being any, to shew that the Court can by its own power, nor is there any provision by statute to give the power, where

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the proceedings are before the sheriff, to deprive a party of his costs merely on the supposition, that the Court does not approve of the proceedings before the sheriff. The ground and foundation, therefore, of this rule fail, and the rule must consequently be discharged, but without costs.

Rule discharged, without costs.

LYDDON v. COOMBES and Another.

Where, on a trial before the sheriff, a verdict is found for the defendant, and the sum claimed by the plaintiff is less than 5*l.*, the Court will not interfere to disturb it, on the ground of its being against evidence.

BERE shewed cause against a rule obtained by *Bingham* for a new trial, on the ground of the verdict being against evidence. The case was tried before the undersheriff. It was an action of debt, and the plaintiff's particulars claimed a sum of 2*l.* 14*s.* One defendant pleaded that he was never indebted, and the other suffered judgment by default. The question litigated at the time of the trial was, whether the defendant who had pleaded was or was not in partnership with the defendant who had suffered judgment by default. The jury ultimately found a verdict for the defendant. This was a matter peculiarly for the consideration of the jury; but a preliminary objection might be taken to the application, in consequence of the small amount which the plaintiff claimed by his particular. It would be observed that the claim was under 5*l.* In the case of *Young v. Harris* (a) the Court held, by analogy to cases where the verdict is in favour of the plaintiff to an amount under 20*l.*, that where the sum in dispute is under 20*l.* the Court will not grant a new trial, though the verdict is for the defendant. In the case of *Packham v. Newman* (b), the Court of Exchequer, when the rule nisi was moved for, inquired whether it was moved as against evidence; and, if so, whether the ver-

(a) 2 C. & J. 14.

(b) 1 C. M. & R. 585.

dict was under 5*l.*; and they intimated that, with the concurrence of the Judges of the other Courts, the rule would be, that, in case of a writ of trial, no new trial as against evidence would be granted, when the verdict was under 5*l.* This was an adoption of the old principle with respect to verdicts under 20*l.*, as it regarded verdicts under 5*l.* As the principle had been adopted in respect of such verdicts, it was but just and reasonable that such an adoption should take place with respect to verdicts in favour of defendants, where the sum in dispute was under 5*l.*

Bingham, in support of the rule, contended that it had been obtained as much on the ground of misdirection on the part of the under-sheriff, as on the ground of the verdict being against evidence. The proof, produced by the plaintiff, that the partnership did exist, was so clear, that it must be considered as a misdirection on the part of the under-sheriff not to have told the jury they ought to find in favour of the plaintiff.

WILLIAMS, J.—The jury were the proper judges of the facts, and if they have drawn a wrong conclusion from them, their verdict must be considered as against evidence. Here, it is said, that the proof was so clear that they could not properly find any other verdict than one in favour of the plaintiff. The objection, therefore, to the verdict is, that it is against evidence. If it were in favour of the plaintiff, and for a sum less than 5*l.*, the case of *Packham v. Newman* is a clear authority to shew that the Court would not interfere to set aside the verdict. It is, however, in favour of the defendant, but the claim in dispute is under 5*l.* I think, therefore, by analogy to the case of *Young v. Harris*, the sum in dispute being under 5*l.*, I ought not to disturb the verdict. The present rule must consequently be discharged.

Rule discharged.

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SPENCELEY v. SHOULS.

A summons to plead several matters returnable in vacation, at the hour the judgment office opens, on the day after the time for pleading expires, is a stay of proceedings, although the time for pleading has been enlarged.

BUTT shewed cause against a rule nisi obtained by *Dowling*, for setting aside an interlocutory judgment, on the ground of irregularity. The alleged irregularity consisted in a suggestion that the judgment had been signed too soon. The determination of the case would depend on a close attention to dates. The defendant's time for pleading expired on the 10th February. On that day, an order for a week's time to plead was made by consent. On the 17th a summons to plead several matters was taken out, and made returnable at eleven o'clock on the morning of the 18th. At eleven o'clock, immediately after the opening of the judgment office, the plaintiff signed judgment as for want of a plea. It was objected, that this judgment had been signed too soon, as the summons so taken out and so returnable operated as a stay of the plaintiff's proceedings, from the time it was made returnable. It was true the case of *Byles v. Walter* (a) had decided that a summons for time to plead, returnable at ten o'clock in the morning in term time, at chambers, operates as a stay of the plaintiff's proceedings, although it is well known that a judge does not attend at chambers at that hour. It seemed also from the case of *Bebb v. Wales* (b), that a summons for further time to plead, returnable at half past ten in the morning during term, is a stay of proceedings. These cases, however, were considered by the profession generally as not sustainable, if they should be reviewed. The case of *Wells v. Secret* (c) would perhaps be cited as in point. The marginal note of that case was, "A summons to plead several matters is a stay of proceedings, if it is returnable at the time the judgment office opens, on the day after the time for pleading expires." In

(a) Ante, p. 232.

(b) Ante, p. 458.

(c) Ante, Vol. 2, p. 447.

that case, however, on examining into the facts of it, the Court would find, that the time there for pleading which had expired was original time, whereas in the present case it was enlarged time. Although the Court might decide that the proceedings of the plaintiff were stayed under such circumstances, yet where the defendant had already obtained the indulgence of an enlargement of the time to plead, he must be considered as bound to plead within that enlarged time peremptorily, and if he did not, the plaintiff was at liberty to sign judgment immediately on the default. On these grounds it was submitted, the present rule ought to be discharged.

Dowling, in support of the rule, contended that the plaintiff had been too early in signing his judgment. The two first cases cited on the other side could not affect the present question, whatever opinion might be entertained by the profession as to their correctness. There, the summons was made returnable before eleven o'clock in the morning during term time, when it was well known by the profession, that during term time no Judge attended at chambers in the morning. The objection made by some members of the profession to those decisions was on that account. In the present case, however, the summons was made returnable in vacation at the usual time for summonses in vacation to be made returnable, and therefore the case came within that of *Wells v. Secret*. With respect to the distinction sought to be established on the other side, between original and enlarged time to plead, that surely was one without a difference. The defendant, by obtaining an enlargement of his time to plead, did not thereby preclude himself from applying for leave to plead several matters. If he did not thus preclude himself from making such an application, there was nothing to prevent a summons for leave to plead several matters, operating in the same way as if the time were original instead of enlarged time. On

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the authority, therefore, of *Wells v. Secret*, it was submitted that the judgment was irregular, and therefore ought to be set aside.

WILLIAMS, J.—The case of *Wells v. Secret* appears to me to be in point. The defendant had the whole of the 17th in which to plead, and the plaintiff could not take advantage of his default in pleading until after the expiration of that day, or before eleven o'clock the next morning, at which time the judgment office opened. At that time the defendant's summons was returnable, and the rule is, that under such circumstances the summons shall be preferred; and therefore it operated as a stay of proceedings, until it was disposed of. So operating as a stay of proceedings, the plaintiff was irregular in signing his judgment at the time he did. The present rule must therefore be made absolute.

Rule absolute.

KERRISON v. WALLINGBOROUGH.

If a defendant, who is an attorney, really appears in person, but, in point of form, as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served.

BAGLEY shewed cause against a rule obtained by *Butt* for setting aside the interlocutory judgment signed in this case, on the ground of irregularity. It was an action for wages brought against the defendant, as one of the directors of the West Cork Mining Company. That company had been incorporated by a private act of Parliament, and one of the provisions of the act was, that any one of the directors might be sued by persons having a claim upon the company. The defendant was one of the directors, and by profession an attorney. When he appeared, he entered his appearance as attorney, and not in person. Before the time for pleading came, the company had determined on defending the action, and employed a Mr. Green as their attorney. On the 20th April, which was in due time, a plea was delivered in this form—"The

defendant, director of the said company as aforesaid, by William Henry Green, his attorney," &c. No order for change of attorney had been obtained previous to the delivery of this plea. The plaintiff treated it as a nullity, and signed interlocutory judgment as for want of a plea. The present rule had been obtained to set aside that judgment. It was now contended, in answer to it, that the defendant had originally a right to appear as attorney, before the other directors chose to undertake the defence of the action, although he was an attorney. If, therefore, the other directors of the company thought proper to defend the action, and, as it was sworn, without the authority of the defendant himself, an order ought to have been obtained for the change of the attorney, otherwise it would be impossible for the plaintiff to know to whom he was to have recourse in the subsequent proceedings in the action. The case therefore came within the mischief, which the rule for serving orders for change of attorney was intended to obviate. Under these circumstances, the plaintiff was entitled to treat the plea as a nullity, it having been delivered in the name of a person who was legally a stranger to the cause.

Butt, in support of the rule, contended that the defendant was not entitled to enter an appearance as attorney for the defendant when he was himself the defendant. His appearance was really and substantially an appearance in person, although the word attorney was not introduced. There was in fact no attorney for the defendant in the action. How, then, could an order for the change of attorney be necessary when there was no person on whom it could operate. The defendant was not personally liable for costs in the action; but the directors were all equally interested in the event. When, therefore, they determined to defend the action, they were only exercising a right which they possessed. For this purpose they em-

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employed an attorney, and as there was no other already employed in the cause, they could have no occasion to obtain an order for a change.

WILLIAMS, J.—This interlocutory judgment was clearly irregular. The defendant in the cause, who was an attorney, appeared in reality in person; but by some mistake he appeared as by attorney in his own name. I think the plaintiff had no right to treat this plea as a nullity. The present rule for setting aside the interlocutory judgment must, therefore, be made absolute with costs. Those costs must be paid to the attorney for the directors.

Rule absolute accordingly.

CROSSBY v. INNES.

In staying proceedings on the bail-bond, it is not necessary to shew that a rule for the allowance of bail has been obtained, if it is sworn that the bail have been put in and justified.

An affidavit, swearing to merits, by the defendant, "as he is advised and believes," is sufficient.

The bail-bond cannot be required to stand as a security, if a trial has not been lost, at the time of moving to stay proceedings.

MANSEL shewed cause on the 28th April against a rule nisi obtained by *Henderson*, for setting aside regular proceedings on the bail-bond, on the ground of bail above having been justified. There were three objections to the application. First, the affidavit with respect to the justification of bail was insufficient. It only stated that bail had been put in and perfected, without stating that a rule for the allowance of the bail had been obtained. The case of *Rex v. The Sheriff of Middlesex*, in the case of *Shew v. Ward* (a), was in point. There, the Court of Exchequer refused, on behalf of bail, to set aside a regular attachment against the sheriff upon an affidavit of merits and on payment of costs, where the rule for the allowance of bail had not been served on the plaintiff's attorney. This shewed the necessity there was that the affidavits should disclose the fact of a rule for the allowance of bail having been obtained. The second objection was to the

(a) Ante, Vol. 2, p. 116.

affidavit of merits. It was made by the defendant himself, and in it he swore that he had a good defence on the merits, "as he is advised and believes." He thus only swore to the merits of his defence in a qualified manner. The practice of the Court, however, had always been to require the defendant or other person making the affidavit to speak positively. He cited *Rex v. The Sheriff of Middlesex* (a), *Tate v. Bodfield* (b), *Lane v. Isaacs* (c), and *Worthington v. ———* (d). If the Court should be of opinion that this application ought to be granted, it could only be on the condition of the bail-bond standing as a security. The plaintiff had declared conditionally on the 7th April, and given notice of it on the 8th; and the defendant resided more than forty miles from town. The defendant then being entitled to eight days' time for pleading after the 8th April, and to fourteen days' notice of trial, it would be impossible for the plaintiff to avoid losing a trial. According to the provisions therefore of 5 Reg. Gen. H. T. 2 Will. 4 (e), the plaintiff was entitled to have the bail-bond stand as a security.

WILLIAMS, J., stopped *Henderson* with respect to the two first objections.

Henderson then proceeded to answer the third, with respect to the question of whether the bail-bond ought to stand as security. He cited *Stride v. Hill* (f), in the marginal note to which was this passage, "To have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule." In the present case the eight days' time to plead, and fourteen days' time for the notice of trial, would not expire before the 30th of

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&
INNER.

(a) Ante, Vol. 1, p. 398.

(b) Ante, Vol. 3, p. 218.

(c) Ante, Vol. 3, p. 652.

(d) 2 C. M. & R. 315.

(e) Ante, Vol. 1, p. 199.

(f) Ante, Vol. 4, p. 709.

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the month. This was only the 28th, and therefore it was impossible to say that the plaintiff had lost a trial before the rule was obtained.

WILLIAMS, J.—With respect to the first point, as to the rule for the allowance of bail, it being sworn that bail had been put in and justified, I must presume that all steps necessary for that purpose have been properly taken. Then, with regard to the second point, which applies to the affidavit of merits, I think that affidavit is sufficient. It is made by the defendant himself, and if he is a person unacquainted with law, and knowing only the facts, he can only know the goodness of his defence in point of law from the advice of others. I do not, therefore, see how he could swear in a more satisfactory manner. As to the third point, with respect to the bail-bond standing as a security, it does not appear to me that the plaintiff is entitled to it. The rule is, that the bail-bond shall not stand as a security, unless a trial is lost at the time of moving for the rule to stay proceedings on the bond. The present rule may therefore be made absolute on the terms that the defendant shall plead issuably on next Monday, and take short notice of trial.

Rule absolute accordingly.

KIDD v. DAVIS.

An affidavit made before a commissioner, who acts as the attorney of the defendant, before an appearance is entered, cannot be used; but it must be clearly shewn that he acted as such attorney at the time of taking the affidavit: it is not sufficient to shew that he is so at the time of making the objection.

F. V. LEE shewed cause against a rule nisi obtained by *Mansel* for setting aside a notice of declaration for irregularity. He objected to the affidavit on which the application had been made, on the ground of its jurat being a violation of 1 Reg. Gen. H. T. 2 Will. 4, s. 6 (a), in

(a) Ante, Vol. 1, p. 184.

being sworn before the attorney in the cause. The words of the rule were, "Where an agent in town, or an attorney in the country, is the attorney *on the record*, an affidavit sworn before the attorney in the country shall not be received." In the present case, it was true there was not at present any attorney on the record, but there was an attorney who was acting for the defendant, and it was before him that the affidavit on which the application was founded was sworn. The case, therefore, came within the spirit of the rule, and the mischief it was intended to prevent.

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Mansel, in support of the rule, submitted that the objection taken only applied to cases where the affidavit was sworn before the attorney on the record. Here, however, no appearance having been entered, and consequently there being no attorney on the record, the rule did not apply.

WILLIAMS, J.—It appears to me that the present case is within the spirit of the rule.

Mansel then contended that the affidavit on which the objection was founded did not entitle the plaintiff to take the objection. It only swore that the affidavit in question was taken before a commissioner, "who is the attorney for the said defendant in the cause." It was quite consistent with this affidavit, that the attorney in question might *now* be the attorney for the defendant, and yet not such attorney at the time when the affidavit supporting this application was sworn. It appeared by the date of the affidavit itself, on which the rule nisi was obtained, that it had been made two months previously. Where parties thought it right to avail themselves of such strictly technical objections, the Court would always require them to prove most strictly that they were in a situation

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properly to take such objections. The Court would not raise any presumption in favour of them, and consequently the present ought not to prevail.

F. V. Lee, in support of his objection, contended that sufficient was shewn on the face of the affidavit to warrant the presumption, that the same person who was attorney now for the defendant was so at the time of making the application.

WILLIAMS, J.—It seems to me, that if the plaintiff wishes to take this objection, he is bound to shew that the person who *is* now the attorney *was* also the attorney for the defendant at the time of making the affidavit. I think, therefore, that the affidavit may be used.

The rule was afterwards made absolute, without costs.

Rule absolute accordingly.

POYNDER v. BLUCK.

"I will see Davis, or write to him; I have no doubt he has paid it: if by chance he has not paid it, it is very fit it should be," in a letter, is not a sufficient acknowledgment of a debt under the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations.

PLATT shewed cause against a rule nisi obtained by *Ryland*, requiring the plaintiff to shew cause why the verdict found in his favour should not be set aside, and a new trial had, on the ground of misdirection on the part of Mr. Serjeant *Arabin*, the Judge of the Sheriffs' Court, before whom the cause had been tried. It was an action for goods sold and delivered, and the defendant pleaded the Statute of Limitations. Several letters were put in, for the purpose of shewing that the defendant had given a sufficient acknowledgment in writing, pursuant to the 9 Geo. 4, c. 14, s. 1, to take the debt out of the operation of the statute. One letter, on which reliance was principally placed, contained this passage:—"I will see Davis,

or write to him. I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be." The learned Judge told the jury this was some evidence from which might be inferred an acknowledgment of the debt, and the jury in consequence found a verdict in favour of the plaintiff to the amount of 3*l.* 2*s.* The present rule had been obtained on the ground that the passage in the letter in question was no evidence at all of an acknowledgment that the debt was due. It was submitted, however, that although it was not conclusive evidence that the defendant acknowledged the debt to be due, it was at least some evidence. If it was any evidence, the case had been properly left to the jury. What weight ought to be attached to it depended on the jury.

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Ryland, in support of the rule, contended that at most the passage in the letter was only something like a conditional promise: it by no means amounted to an acknowledgment that the debt was due to the defendant. He cited *Knott v. Farren* (a), *Lloyd v. Maund* (b), *Hellings v. Shaw* (c), *Snook v. Mears* (d), *Whippy v. Hillary* (e), *Birk v. Guy* (f), and *Brydges v. Plumptre* (g).

WILLIAMS, J.—It appears from the note of Mr. Serjeant *Arabin*, that he doubted whether there was sufficient evidence for the jury, and the question now is, whether there was any evidence to maintain the verdict. As to any actual promise to pay, there is no pretence for it, nor is it indeed contended that there is. The expressions, "I will see Davis, or write to him: I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be," form by no means an unconditional promise. Then comes

(a) 4 Dowl. & Ryl. 179.

(b) 2 T. R. 760.

(c) 7 Taunt. 608; 1 Moore, 340.

(d) 5 Price, 636.

(e) 3 B. & Ad. 399; 5 Car. & P. 209.

(f) 4 Esp. 184.

(g) 9 Dowl. & Ryl. 746.

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the other question, whether sufficient appears on the letters to shew that the debt is still unpaid, from which the law will imply a promise to pay; and to that there seems to me the same answer. The first letter says that the debt has been paid, and the other letter is rather an assertion that it has been paid by some one else. There is no intimation by the defendant that he thinks the debt still due. The reported cases certainly run very near each other; but it is also certain, that the latter cases shew that it now requires stronger evidence to take a case out of the statute. It was formerly held that a slight acknowledgment was sufficient, as "what an extravagant bill you have delivered me" (*a*). So, also, where the defendant said he was protected by the statute (*b*). The later cases, however, do not go to that extent, and so I think there is no acknowledgment here that the debt was in existence, and still less was there any promise to pay it. The rule must therefore be made absolute for a new trial, on payment of costs.

Rule absolute accordingly.

(*a*) *Lawrence v. Worrull, Peake*,
93.

(*b*) *Coltman v. Marsh*, 3 Taunt.
380.

SHEARMAN v. M'KNIGHT.

It is not a sufficient compliance with section 4 of the Uniformity of Process Act, as to delivering a copy of the *capias* to the defendant, to deliver it at seven o'clock in the evening, when the arrest took place at nine o'clock in the morning.

BUTT shewed cause against a rule nisi obtained by *Martin*, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Sussex, on the ground that the requisites of 2 & 3 Will. 4, c. 39, s. 4, had not been complied with, by delivering a copy of the writ of *capias* on which the arrest had taken place, to the defendant, upon or forthwith after the execution of the process. It appeared from the affidavits that the defendant having been arrested, no copy of the writ had been delivered to the defendant until

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seven o'clock in the evening of the day on which the arrest took place. The section of the Uniformity of Process Act, which made provision for the issue and execution of writs of *capias*, directed that the copy of the writ should be "forthwith" delivered to the defendant on the execution of the process. The question was, what interpretation the Court would put on the word "forthwith." The words of the section being "upon or forthwith after," in the alternative, it was clear the Legislature did not intend that the delivery should be necessarily upon the execution of the process. It might, therefore, be after its execution. If it might, then the word "forthwith" must be understood to mean "*within a reasonable time.*" Now, in the present case, the defendant was arrested at nine o'clock in the morning, and the copy of the writ of *capias* was delivered to him at seven o'clock in the evening. Under the circumstances, this must be considered as a delivery to him within a reasonable time. No injury could result to the defendant from not receiving it sooner. But, if even the delivery were not sufficiently early, that resulted from the negligence of the officer of the sheriff who was entrusted with the execution of the process. The plaintiff's rights ought not to be injured in consequence of the sheriff's carelessness. The plaintiff was only bound to deliver the copies to the sheriff, and it would be presumed that he had duly delivered them. The remedy should have been against the sheriff.

WILLIAMS, J.—The sheriff must be considered as the agent of the plaintiff in the execution of the process, and he must be answerable for any non-compliance on the part of the sheriff with the provisions of the act.

Butt.—Even supposing that the plaintiff was answerable, this non-compliance with the act could only be considered as an irregularity, as the provision contained in

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the section on this subject was merely directory. That could not make the process itself void, and therefore the defendant was not entitled to be discharged from his custody under it. Where an objection was of this minute description, the court was in the habit of refusing to interfere for the discharge of the defendant. Thus in the case of *Forbes v. Mason* (a), the Court of Common Pleas held that the omission of the immaterial particles in the writ of *capias* is not an irregularity of which the Court will take notice, if the omissions do not alter the meaning of the writ. Here the defendant had been served with a copy of the writ, which was correct, and which gave him all the information requisite with respect to the course he ought to adopt in order to obtain his discharge out of custody. All, therefore, which the Legislature could have had in view for the benefit of the defendant had been done. The present rule, consequently, ought to be discharged.

Martin, in support of the rule, contended that the directions of the statute must be strictly pursued. It had been the uniform practice of the Courts to require parties who made use of the extraordinary remedy of arrest to adhere most scrupulously to the course prescribed by the statute. The question as to whether any inconvenience resulted to the party or not, in consequence of the defect complained of, was not the principle on which the Court had in those cases acted; but it was, that the statute had given plaintiffs a particular power which they were bound strictly to pursue. But in the present case the omission to serve the copy forthwith, that was, immediately after the execution of the process, might be productive of an extended imprisonment. Until the defendant received a copy of the writ, he was unaware of the steps necessary to be taken in order to procure his liberation from custody

(a) Ante, Vol. 3, p. 104.

Here, however, he had remained in prison from nine o'clock in the morning until seven o'clock in the evening, before the copy was served. Had he received earlier information, he might at an earlier period have procured bail, and thus obtained his liberation. This observation evidently shewed that the provision contained in the section in question was in favour of liberty, and therefore it was clear that the Legislature intended by the word "forthwith," that the copy should be delivered immediately after the arrest. If the form of the writ itself were examined, this argument was still further supported. One of the clauses contained in it was in these words, "And we do further command you, that on execution hereof, you do deliver a copy hereof to the said defendant." The writ prescribed the duty of the sheriff, and that duty was to deliver the copy "on execution" of the process. As to the objection only amounting to an irregularity, and that therefore the Court would not interfere to discharge the defendant, the case of *Hodgson v. Towing* (a) was analogous. There, the marginal note was, "Where a defendant has been arrested on a ca. sa., to execute which the sheriff's officer has broken an outer door, the Court will discharge him out of custody on a summary application." In that case the interference of the Court was much stronger than in the present; for there, the process was final, whereas in the present instance it was mesne. For these reasons it was submitted that the present rule ought to be made absolute.

WILLIAMS, J.—The first question is, how I am bound to interpret the term "forthwith" in this act of Parliament. I think that no one can doubt, on reading the act, that all the forms prescribed in the writ are intended for the benefit of the party arrested, and, therefore, it is incumbent on

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(a) Ante, p. 410.

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those executing the process to comply with the precise directions of the act, which cannot be more express. The act requires that the persons making the arrest "shall upon or forthwith after the execution of such process cause one such copy to be delivered to every person upon whom such process shall be executed." That seems to be an injunction which it is intended shall be imperative, and I am bound to suppose that there was some good reason for the enactment. That reason is apparent; it is that the copy is intended to be left with the party, so that he may immediately set himself in motion to find bail and procure his liberty. As, therefore, the statute prescribes that a copy of the *capias* should be *forthwith* delivered, I am bound to give that construction to it which will have the greatest effect for the ease and favour of the party arrested. The next question is, whether or not I am satisfied that a copy of the *capias* was delivered to the defendant at the time of the arrest (or within such a time afterwards as will come within the description of the term "forthwith"), and I think that on these affidavits it appears that there was not any copy so delivered. The statute not having been complied with, this rule must be made absolute, but on the terms of no action being brought.

Rule absolute accordingly.

REEDER v. WHIP and Another.

In applying to sign judgment on a warrant of attorney, it is insufficient for the deponent to swear that he believes the defendant to be alive, from information which he has received, unless he also swears that he believes the information to be true.

HOGGINS applied to be allowed to enter up judgment upon an old warrant of attorney. The affidavit on which he moved was rather peculiar in its terms, in the mode of stating the defendant to be still alive. It was deposed by the person making the affidavit that one of the defendants had been seen alive within a few days; but with

which he has received, unless he also swears that he believes the information to be true.

respect to the other, it was merely sworn that inquiries had been made by the deponent, and that from them, "he verily believed, that the defendant was alive on the 15th of April," the present application being made on the 6th of May. The affidavit, however, did not proceed to state that the deponent believed the information he had received to be true.

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WILLIAMS, J.—I think that is insufficient, and therefore I cannot grant you the rule.

Rule refused.

JACOBS v. GRIFFITHS.

PALMER applied to enter up judgment on an old warrant of attorney. The application was made on the 4th May. The defendant was in the army, and the mode in which it was sought to shew that he was still alive was, by the production of an affidavit made by an army agent in London, who stated that he had on the 1st of May paid a cheque drawn in the handwriting of the defendant, dated nine days previous.

In applying to sign judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive, to shew that a cheque of his has been paid, dated thirteen days before the application.

WILLIAMS, J.—I think that is sufficient, and therefore you may take the rule.

Rule granted.

CARTER's Bail.

BUSBY objected to the justification of the bail in this case, on the ground that in the affidavit of sufficiency the bail had merely sworn to be "possessed" of the required sum, instead of "worth" that amount, contrary to the di-

If, in the affidavit of sufficiency, made under the rules of T. T. 1 Will. 4, the bail swear themselves "possessed,"

instead of "worth," the required sum, it is not a ground for rejection, but merely of depriving defendant of costs of justifying.

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rections of 1 Reg. Gen. H. T. 2 Will. 4, s. 19 (a), which made an amendment in the form given by the rules of Trinity Term, 1 Will. 4 (b). It was true, that in the form the word used was "possessed," but the word required by the subsequent rule was "worth." The practice was now clearly established, by a long train of accordant decisions, that "worth" must be used. The defendant by adopting the form given by the rules of Trinity Term, 1 Will. 4, was bound to pursue it strictly. If he did not, he had not placed himself in a situation to justify. He cited *Penson's Bail* (c), the marginal note of which was, "If a defendant, in justifying his bail, adopts the new practice under T. T. 1 Will. 4, he must conform to it strictly, and therefore an affidavit of sufficiency, though good by the old practice, but defective by the new, is insufficient." Under these circumstances, the bail ought not to be allowed to justify.

Knowles, in support of the bail, contended that although the exact form of the affidavit had not been complied with, the only effect of the informality was to prevent the defendant from obtaining the costs of justification, to which he would otherwise have been entitled. That was the usual course adopted by the Courts in such cases.

WILLIAMS, J.—I think the bail may justify. The only effect of not complying with the rule in this respect is, to prevent the defendant from obtaining the costs of justification (d).

Bail justified.

(a) Ante, Vol. 1, p. 185.

(b) Ante, Vol. 1, p. 106.

(c) Ante, Vol. 4, p. 627.

(d) See *Worlison's Bail*, ante, Vol. 2, p. 53, where *Gurney*, B., intimated that, for the future, no amendment of the affidavit of sufficiency, by substituting "worth" for "possessed," would be al-

lowed; and *Naylor's Bail*, ante, Vol. 3, p. 452, where the Court of Exchequer refused to allow the amendment, and intimated that, by making an affidavit of merits, and on payment of costs, an application might be made to stay proceedings. In that case the bail were rejected.

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JOHNSON v. RUTLEDGE.

R. V. RICHARDS moved to discharge a defendant out of custody, under the 48 Geo. 3, c. 123, on the ground of his having remained twelve successive calendar months in execution for a debt not exceeding 20*l*.

The notice of an application, under the 48 Geo. 3, c. 123, ought to be served on the plaintiff, and not his attorney; but if it is not, the defendant may, on the notice being disposed of, take a rule nisi, for his discharge, to be served on the plaintiff.

Cowling appeared to oppose the application in the first instance, and objected, that the notice, pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 90 (a), had been served on the attorney instead of the plaintiff in the cause. This, he contended, was insufficient, because the office of the attorney was at an end when judgment had been signed. He cited *Kelly v. Dickinson* (b), and *Gordon v. Twine* (c).

R. V. Richards admitted the objection to be fatal, but submitted that he might now take a rule to shew cause, to be served on the plaintiff himself.

PATTESON, J.—The notice ought to be served on the plaintiff himself, and you may now take a rule nisi for his discharge, but that must be served on the plaintiff, not on his attorney.

Rule nisi accordingly.

(a) Ante, Vol. 1, p. 546.

(b) Ante, Vol. 1, p. 195.

(c) Ante, Vol. 4, p. 560.

R U L E .

OF

*The Courts of King's Bench, Common Pleas, and
Exchequer, appointing Examiners.*

EASTER TERM, 1837.

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IT IS ORDERED, that the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, and Exchequer respectively, together with William Tooke, Thomas Adlington, Samuel Amory, Benjamin Austin, Michael Clayton, Edward Foss, Richard Harrison, Philip Martineau, Thomas Metcalfe, Charles Ranken, Charles Shadwell, and John Teesdale, gentlemen, attorneys, be, and the same are hereby appointed Examiners for one year, now next ensuing, to examine all such persons as shall desire to be admitted attorneys of all or either of the said Courts, and that any five of the said Examiners, one of them being one of the said Masters or Prothonotaries, shall be competent to conduct the said examination, in pursuance of and subject to the provisions of the Rule of all the said Courts, made in this behalf in Hilary Term, 1836. (Signed)

DENMAN,
N. C. TINDAL,
J. LITTLEDALE,
J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,

E. H. ALDERSON,
J. PATTESON,
J. GURNEY,
J. WILLIAMS,
J. T. COLERIDGE,
T. COLTMAN,
ABINGER.

COURT OF EXCHEQUER.

Easter Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

RYLAND *v.* WORMWALD.

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THE declaration was delivered on the 8th of March, and on the 13th (the 12th being Sunday) the defendant delivered a plea of privilege as an attorney of another court. The plaintiff signed judgment, conceiving that the plea should have been delivered within four days inclusive.

The 8th rule of H. T. 2 Will. 4, as to the calculation of time, applies to pleas in abatement.

Cowling moved to set aside the judgment and subsequent proceedings for irregularity. He admitted that under the old practice the plea would be too late, but contended that the 8th rule of H. T. 2 Will. 4, (a) applied as well to pleas in abatement as other pleas.

Channell shewed cause.—The rule does not extend to pleas in abatement. Since that rule it has been the inviolable practice to plead four days inclusive. Notwithstanding the rule of H. T. 2 Will. 4, which makes two days' notice of bail sufficient in certain cases, if bail justify the next day but one, the notice must nevertheless be

(a) "And it is further ordered, that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day,

unless the last day shall happen to fall on a Sunday, Christmas-day, or Good Friday, or a day appointed for a public fast or thanksgiving; in which case, the time shall be reckoned exclusively of that day also." Ante, vol. 1, p. 200.

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served before eleven o'clock in the forenoon. [*Parke, B.*—The rule has used words which, if considered according to their grammatical construction, extend the time. *Alderson, B.*—This is clearly a case in which a particular number of days are prescribed by the *practice of the Court*; and if so, the first day is inclusive, the last exclusive]. The courts have always been of opinion that pleas in abatement ought not to be favoured. *Jennings v. Webb (a)*, and *Long v. Miller (b.)*

Cowling referred to *Pepperell v. Burrell (c.)*.

PARKE, B.—Whether or no pleas in abatement were in the contemplation of the framers of the rule I cannot tell, but the very best rule of construction is the grammatical construction, unless it leads to manifest absurdity. As the rule has not yet been applied to pleas in abatement, the present rule will be absolute without costs.

Rule absolute.

(a) 1 T. R. 279.

(b) 2 Stra. 1191.

(c) 1 C. M. & R. 372.

DONCASTER v. CARDWELL.

Where a defendant is under terms to accept short notice of trial, there can be no countermand.

ADDISON shewed cause against a rule obtained by *W. H. Watson*, for judgment as in case of a nonsuit. The defendant was under terms of taking short notice of trial, and notice was given on the 17th of March for trial at the Assizes on the 25th, which notice was countermanded on the 21st. The only question was, whether the defendant was entitled to the costs of the day. It was submitted that the defendant being under terms to accept short notice of trial, it was not necessary to give six days'

notice of countermand. The rule of H. T. 2 Will. 4, s. 61, made six days' notice of countermand necessary in country causes, *unless* where short notice of trial should be given (*a*).

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PARKE, B.—The officer says that there can be no countermand where the plaintiff gives short notice of trial. He must therefore pay the costs.

Rule accordingly.

(*a*) Ante, Vol. 1, p. 190.

PLATT v. HALL.

IN this case the verdict was taken by consent for the amount of damages in the declaration, subject to the award of an arbitrator. *Crompton* having obtained a rule for the delivery of the postea to the plaintiff, in order that he might enter the verdict pursuant to the arbitrator's award,

Where a rule is drawn up on reading a particular document, it is sufficient to describe it as a "paper writing," without stating the nature of the document.

Willmore shewed cause.—The rule is drawn up upon reading the affidavit of T. C. and the paper writing thereto annexed. It is not sufficient to refer thus to the award, but the document itself ought to be specified. In *Sherry v. Oke* (*a*), a rule to set aside an award was drawn up upon reading a paper writing, which was in fact a copy of the award; but it was not stated so to be, and it was held to be insufficient. [*Parke*, B.—That decision proceeded on the ground, that there was no affidavit that the paper writing annexed was a true copy of the award. *Alderson*, B.—There, the rule was not drawn up on reading the award, but upon reading a paper writing purporting to be a copy of the award, but which did not appear to be a true copy].

(*a*) 1 H. & W. 119.

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Crompton referred to the report of *Sherry v. Oke* (a), by which it appeared, that the rule for setting aside the award was drawn up on reading an affidavit, but no copy of the award was annexed to that affidavit.

PARKE, B.—That makes a clear distinction from the present case.

Willmore then shewed cause upon the merits.

(a) Ante, Vol. 3, p. 349.

WATSON v. DOW.

An appearance cannot be entered nunc pro tunc; and therefore, if it be not entered until after judgment signed upon a cognovit, the judgment may be set aside for irregularity.

PETERSDORFF shewed cause against a rule obtained by *Godson*, for setting aside judgment signed upon a cognovit, for irregularity. The objection was, that an appearance was not entered until the third day after judgment signed. It was submitted, that the defendant was estopped from objecting to the irregularity, an appearance having been entered nunc pro tunc: *Davis v. Hughes* (a). [Parke, B.—At the time that case was decided there was relation to the first day of term: the officer says there is no relation of an appearance]. By the terms of the cognovit, the defendant authorizes T. K. or any other attorney, to appear for him if necessary. It is not competent, therefore, for the defendant, after having authorized an attorney to act for him, to come before the court and repudiate the act of his own agent.

PARKE, B.—The plaintiff should have taken care not to have signed judgment, till after the defendant was in court. The rule must be absolute—no action to be brought.

Rule accordingly.

(a) 7 T. R. 206.

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WYATT v. HOWELL.

BAIN moved for judgment as in case of a nonsuit. Issue was joined on the 26th of November, the day after Michaelmas Term. He submitted that the issue must be considered as joined in Michaelmas Term, and in that case a motion in Easter Term would be too soon.

Where issue was joined the day after Michaelmas Term:—*Held*, that a motion for judgment as in case of a nonsuit, in Easter Term, was too soon.

PARKE, B., stated that the point had arisen in other cases which were pending, and that he would consult the Judges.

On a subsequent day his Lordship stated that he had consulted with the other Judges, and they were of opinion that the application came too soon.

Rule refused.

In *Gough v. White*, which was a similar motion, the rule was discharged.

EDWARDS v. JONES.

THE defendant in this case was arrested for 100*l.*, and went to prison, where he remained until he was discharged out of custody on account of a defect in the affidavit to hold to bail. The action was brought on a promissory note for 100*l.*, made by the defendant, and indorsed to the plaintiff. The defendant pleaded that the note was given upon a special consideration, which had failed, and that the plaintiff had given no value for it. The plaintiff replied by entering a *nolle prosequi*, except as to the sum of 49*l.*, for which amount he had, in fact, given value. A

The holder of a bill, who has given some value for it, is entitled to arrest for the whole amount of the bill, unless he is aware that no consideration passed between the prior parties to that amount; and therefore, though he recover less than the amount for

which he arrested, the defendant is not entitled to costs under the 43 Geo. 3, c. 46.

Semle, that where a party is arrested and goes to prison, he is arrested *and held to special bail* within the meaning of the 43 Geo. 3, c. 46, s. 3.

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verdict having been found for the plaintiff for 49*l.*, *Thomas* obtained a rule nisi to allow the defendant his costs, under the 43 Geo. 3, c. 46, s. 3.

V. Williams shewed cause.—The defendant has been arrested, and remained in gaol until a formal defect was discovered in the affidavit of debt, upon which he was discharged out of custody under a Judge's order. The question then is, whether the defendant had been *arrested* and *held to bail* within the words of the statute. The 3rd section enacts, "that in all actions wherein the defendant or defendants shall be arrested *and* held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested *and* held to special bail, such defendant or defendants shall be entitled to costs of suit," &c. To entitle a defendant to costs there must be not only an arrest, but also a holding to special bail. In *Bates v. Pilling* (a), *Bayley, J.*, says—"It is always desirable to adhere as much as possible to the language of an act of Parliament, and to construe every passage of it consistently with the context. In construing an act of Parliament we may look at the title, and if we do so in this instance, we find that it is intitled "An Act for the more effectual Prevention of frivolous and vexatious Arrests;" and then, when we come to the provisions, we find that they apply to all actions wherein the defendant or defendants shall be *arrested and held to special bail*. The words are not where the defendant shall be arrested alone, or held to special bail alone; nor are the words arrested and held to special bail synonymous, so as to make one of them useless and nugatory; but they mean different things, and are distinct proceedings, in which different parties act." The same point came before the Court in *Wilson v. Brough-*

(a) 2 C. & M. 374; ante, Vol. 2, p. 367.

ton (a), but that case was decided upon another ground. *Park, J.*, in *Amor v. Blofield* (b), was of opinion that the party must be arrested *and* held to special bail. [Lord *Abinger, C. B.*—A man who voluntarily gives special bail is in no sense arrested: when a man is arrested he is held in custody for the purpose of giving special bail. In the case of *Bates v. Pilling, Vaughan, B.*, considers that there must be both an arrest and holding to bail; but that point was not before the Court, for the question was, whether there must not be an arrest first. *Parke, B.*—If a man is arrested until he gives special bail, is he not held to special bail? The meaning of arresting him is to hold him in custody until he shall give bail. If a man is arrested and placed under the obligation of giving special bail, is he not within the act?] Suppose a party arrested, and immediately after he is told that he need not put in special bail, but only a common appearance, that would not be a case within the statute. [*Parke, B.*—If arrested and placed under the obligation of giving bail, is not that enough?] It is submitted that he ought to say that he would take the benefit of the statute. In the present case, the defendant has not got out of prison by due course of law, but by taking advantage of a defect in the affidavit to hold to bail. It is an established rule in the construction of wills, that *or* may be construed *and*, in order to give effect to the intention of the testator; but the Courts would not do so where such a construction is likely to do violence to the testator's intention. The most convenient view of the statute is, that no person is entitled to the benefit of it except he be arrested, and after being arrested is held in custody until he puts in bail in due course of law. The term special bail is used in the statute in contradistinction to common bail. [*Parke, B.*—If the

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(a) Ante, Vol. 2, p. 631.

(b) 9 Bing. 91; S. C. 2 M. & Scott, 156.

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holding to special bail means that a party is imprisoned until he finds, and in order that he may find, special bail, in that sense he is held to special bail: *Bates v. Pilling* is not decisive in this case, but only that there must be an arrest. *Alderson, B.*—If you look at the act; it is clear the legislature contemplated an arrest; the reasons upon which the Judges decided *Bates v. Pilling* are utterly irreconcilable with the point before them].

Thomas, in support of the rule.—The preamble of the act explains the intention of the legislature—it is for the more effectual prevention of frivolous and vexatious arrests, and for the relief of persons imprisoned on mesne process. Suppose a person arrested went to prison, not being able to find bail, and remained in prison until after verdict, that would be a case within the act. Where there has been an arrest, which puts a party in such a situation that he must give bail or go to prison, that satisfies the act. The meaning of the statute is not that he must give special bail, but that there shall be such an arrest as compels him to give bail, in order to obtain his liberty. *Amor v. Blofield* merely decided that there must be an arrest. Besides, the plaintiff did not know that the payee had given no value for the note, and therefore he would be entitled to arrest for the whole amount.

Lord ABINGER, C. B.—The present case does not call upon us to make any decision upon the point raised by Mr. *Williams*, since it appears the plaintiff had no knowledge that this was an accommodation note. If, indeed, the plaintiff had known that fact, and had then arrested the defendant, the question would have arisen under the 43 Geo. 3. But there is nothing improper in a party who holds a bill for which he has given some value bringing his action for the whole amount, unless he has ascertained that there can be no claim against the defendant beyond his

own. If it were not so, in what a situation would bankers be, who have a lien upon bills for the balance due from their customers. It may happen that less is due to them than the amount of the bills pledged, but they would act improperly not to bring their action for the whole amount.

PARKE, B.—I do not feel called upon to say anything as to whether the defendant is in a condition to apply for costs under the 43 Geo. 3. The plaintiff was the holder of a note for 100*l.*; *prima facie* 100*l.* was due upon it; he gave 49*l.* for it, and was entitled to sue for the whole; since the holder of a bill has not only his own title, but the title of the prior party.

BOLLAND and ALDERSON, Bs., concurred.

KING *v.* Earl of DUNDONALD.

ASSUMPSIT for goods sold and delivered. The defendant pleaded non-assumpsit, except as to the sum of 30*l.*, and as to that sum, payment of 30*l.*, and acceptance thereof in satisfaction. Replication, as to the sum of 30*l.* alleged to have been paid by the defendant to the plaintiff, that the same was paid on another and different account, and for another and different cause of action than that in the declaration mentioned, without this, that the defendant paid to the plaintiff, or that the plaintiff accepted and received from the defendant, the said sum of 30*l.* in the said plea mentioned, in satisfaction and discharge of the sum of 30*l.*, parcel &c., in the declaration mentioned. The cause was referred to an arbitrator, who by his award found for the defendant upon the plea of non-

To an action for goods sold and delivered, defendant pleaded, as to 30*l.*, parcel &c., payment of 30*l.* in satisfaction. Defendant replied, that the 30*l.* was paid for another and a different cause of action, specially traversing the acceptance of it in satisfaction of that sum in the declaration mentioned. The cause was referred; and upon this issue the arbitrator found for the

defendant as to 3*l.*, and for the plaintiff as to the residue:—*Held*, that the award was sufficiently certain, and that this finding in effect assessed the damages at 27*l.*

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assumpsit, and also for the defendant as to the sum of 3*l.*, parcel of the sum of 30*l.* in the plea mentioned, and as to the residue thereof for the plaintiff.

W. H. Watson now moved to set aside the award, on the ground of uncertainty. He contended that the arbitrator should have gone on to assess the amount of damages. The new assignment, coupled with the plea, did not admit the precise sum of 27*l.* to be due. *Cousins v. Paddon* (a) was distinguishable from the present case; for there, the issue was upon the plea of payment, and a smaller sum was proved to be paid than that which the defendant pleaded.

PARKE, B.—The replication is not a new assignment—it takes issue on the plea with a special inducement. The defendant says that he paid to the plaintiff, and the plaintiff received in satisfaction, 30*l.*, in respect of so much of his demand in the declaration. The plaintiff replies, that it was another and different 30*l.*, and that he did not receive it on account of any part of his claim in the present action. Upon that issue, the arbitrator finds for the defendant as to 3*l.*, and for the plaintiff as to the residue. That assesses the amount of damage upon that issue to 27*l.*

ALDERSON, B.—The finding of the arbitrator is, in substance, that a verdict shall be entered for the plaintiff for 27*l.*

Rule refused.

(a) 2 C. M. & R. 547.

1837.

JONES v. TURNBULL.

THIS was a rule under the first section of the Interpleader Act. It appeared that the plaintiff, who was a builder, had become bankrupt in July, 1835, and had not since obtained his certificate. In October, 1836, he commenced an action against the defendant for the balance of a claim of 388*l.*, in respect of repairs done by him for the defendant. The cause came on for trial before Lord *Abinger*, C. B., when the plaintiff was nonsuited, it appearing that the credit had not then expired. It was, however, agreed that the cause should be referred to an arbitrator, who by his award found 124*l.* due to the plaintiff, after deducting the costs of the nonsuit. This sum was claimed by the assignees under the fiat. The attorney for the defendant also set up a claim for his costs in the successful action, and for 40*l.* lent to the plaintiff for the purpose of enabling him to perform the work which was the subject of the action. The plaintiff having brought an action on the award, *Platt*, on the part of the defendant, obtained the present rule.

The plaintiff, a builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited: the cause was referred, and the arbitrator found a sum due to the plaintiff:—*Held*, that the plaintiff's attorney had a claim, as against the assignees, to the amount of his lien on the award for the costs of the action and of the award.

Chandless, for the assignees.—This is a sum which the assignees are entitled to claim, and if so, the attorney can have no lien as against them. In *Crofton v. Poole* (a), the plaintiff, a furniture broker, and an uncertificated bankrupt, was employed by the defendant in removing his goods, and for that purpose procured vans, supplied packing cases and crates, and employed five or six men in the packing, unpacking, and conveyance of the property, and this was held to be a debt claimable by the assignees. The plaintiff's attorney has clearly no claim for the 40*l.* lent. As to the costs of the action, he has been employed

(a) 1 B. & Adol. 568.

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to bring an action for money to which the assignees were entitled. [*Parke, B.*—Would he not have had a lien on the award as against the plaintiff?] The case must be tried by the same principle as if the assignees had brought an action against the defendant: he could not have pleaded the lien of the plaintiff's attorney. [*Lord Abinger, C. B.*—The award would be in the possession of the attorney, and if the assignees had brought an action upon it, the attorney might have refused to let them have the award until they had paid him his lien. *Parke, B.*—The original claim for work, labour, and materials would merge in the award, and if the assignees call for the award, they must allow the attorney the same lien upon it as he would be entitled to claim against the bankrupt].

LORD ABINGER, C. B.—The Court is disposed to think the attorney entitled to his lien on the award for his costs, and the residue belongs to the assignees. It should be referred to the Master to ascertain the amount of the attorney's claim, and he may have the costs of the action and of the award, but not the 40% lent: the surplus is to be paid into Court.

. Rule accordingly.

WALKER v. CATLEY.

In an action by indorsee against drawer of bills of exchange, defendant pleaded that J. E. made and indorsed the bills in the name of defendant without any authority from him. Replication, that the bills were not made or indorsed by the said J. E. The defendant having demurred to this replication, the Court refused to set aside the demurrer, and allow the plaintiff to sign judgment as for want of a plea.

ASSUMPSIT by indorsee against drawer of three bills of exchange. Plea—That the said bills of exchange were respectively made and indorsed by one J. E., in the name of the defendant, he the said J. E. then pretending to be the agent of the defendant, and duly authorized by him to draw and indorse the said bills: averment, that J. E. was not the agent of the defendant, nor was he authorized to draw and indorse the said bills, and that the

The defendant having demurred to this replication, the Court refused to set aside the demurrer, and allow the plaintiff to sign judgment as for want of a plea.

defendant had not in any way ratified or confirmed the act of the said J. E. Replication—That the said bills were not, nor was any or either of them made or indorsed by the person in that plea mentioned, to wit, the said J. E., modo et forma. Demurrer, assigning for cause that the replication raised an immaterial issue.

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Wightman having obtained a rule to set aside the demurrer and sign judgment as for want of a plea,

W. H. Watson shewed cause, and contended that there was good ground of demurrer. If it were found, upon an issue raised, that J. E. did not make the bills, it would not necessarily follow that defendant did, and in that case there must be a repleader. The plaintiff should have demurred to the plea.

Wightman, in support of the rule.—The demurrer admits that J. E. did not make the bills, and if so, the defendant did. The declaration says defendant made the bills of exchange; to which he replies that the bills were made by J. E. in his name. Supposing that fact is found against him, there is no plea—the ground of defence wholly fails. The plea amounts to a confession that if J. E. did not make the bills the defendant did.

LORD ABINGER, C. B.—It is not so obvious as to entitle you to make your rule absolute.

PARKE, B.—As there is some doubt about the point, the rule must be discharged.

Rule discharged.

1837.

IKIN v. PLEVIN and Others.

In the issue the date of the writ of summons was wrongly stated; the word defendant was used instead of defendants, and the award of venire was to the *then* sheriff:—*Held*, that these errors were no ground for setting aside the issue, but that the proper course was to apply to a judge at chambers to amend it at the plaintiff's cost.

COWLING shewed cause against a rule obtained by *Hoggins* for setting aside the issue for irregularity. The issue stated the date of the writ of summons to be November, 1837, instead of November, 1836: in several places the word defendant was used instead of defendants, and the conclusion was "therefore the *then* sheriff is commanded," &c. It was submitted that, notwithstanding these errors, the writ was not irregular, and that the proper course was to apply to a Judge at chambers to amend the errors at the cost of the plaintiff. Besides, the defendant's attorney had accepted the paper book, which was an admission of its being properly made up.

Hoggins, in support of the rule.—The record is framed from the issue, and it is material that it should be correct, in case any question should arise at the trial as to the precise day on which the writ of summons was sued out. In *Peel v. Ward* (a), which was an action for a sum under 20*l.*, and a Judge's order had been obtained to try the cause before the sheriff, the Court set aside the issue, the notice of trial, and the Judge's order, because the issue was not drawn up according to the form prescribed by the rule of Court. [*Alderson*, B.—There is a distinction between that case and the present; there, the issue was drawn up in a form which did not give the Judge any power to make the order for trial before the sheriff; here, it is merely an informality]. The issue should follow the form given by the rule, but the award of venire is incorrect, as it is addressed to the *then* sheriff.

ALDERSON, B.—The case of *Peel v. Ward* is no authority for the present motion. This rule must be discharged

(a) Ante, p. 169.

without costs, and application should be made to a Judge at chambers to amend the issue, at the cost of the plaintiff.

Rule discharged (a).

(a) See *Wight v. Perrers*, ante, p. 463.

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PLEVIN.

KING v. ERLE.

W. H. WATSON moved to set aside the judgment in this case, so far as related to the costs, and to enter a suggestion under the 45 Geo. 3, c. 62, (the Bath Court of Requests' Act), the plaintiff having recovered less than 5*l*. The writ had issued on the 17th of January, and an appearance had been entered for the defendant under the statute. The defendant suffered judgment by default, and on the 25th of February final judgment was signed, and the costs taxed, and on the 1st of March a writ of *fi. fa.* issued. It was submitted that the application could not have been made sooner, and *Bond v. Bailey* (a), *Godson v. Lloyd* (b), and *Baddley v. Oliver* (c), were referred to.

The Court permitted a suggestion to be entered to deprive the plaintiff of costs after final judgment and writ of execution issued, where it appeared that the defendant could not apply sooner, and a Judge at chambers had refused to stay proceedings after verdict.

Crowder shewed cause, and objected that the application was too late. He cited *Hippesley v. Layng* (d).

PARKE, B.—The only question here is, whether the defendant might not have applied to a Judge at chambers to stay proceedings.

W. H. Watson stated that application had been made to a Judge, who had refused to interfere.

PARKE, B.—I think the rule must be absolute.

Rule absolute.

(a) Ante, Vol. 3, p. 808.

(c) 1 C. & M. 219.

(b) Ante, Vol. 4, p. 157.

(d) 4 B. & C. 363.

1837.

MANN and Others v. Lord AUDLEY.

Quære, if, since the new rules, the Court will, after the death of a defendant, permit judgment to be entered on a cognovit nunc pro tunc.

ON the 8th of February, 1833, the defendant executed a cognovit, with liberty to enter up judgment on the 1st of May following, and on the 15th of January (1837) last the defendant died.

Dasent moved for a rule calling on the executors of the defendant to shew cause why judgment should not be entered up upon this cognovit. Under the old practice applications were frequently made to enter up judgment nunc pro tunc; and when a defendant died in vacation, the Courts permitted judgment to be entered as of the preceding term (a).

PARKE, B.—Since the new rules, there is no precedent for a motion of this kind.

On a subsequent day, *Dasent* stated that a rule of this description had been granted in the Court of King's Bench in the case of *Harrison v. Executors of Sir George Naylor*.

Kelly, amicus curiæ, stated that he had moved for the rule alluded to, but no cause was shewn, the claim having been settled. The Court of King's Bench appeared to be of opinion, that where a party comes within a reasonable time after the representative appears it is sufficient, inasmuch as till then there is no one upon whom the rule could be served.

LORD ABINGER, C. B.—Where a defendant died in vacation, judgment then entered up would have relation to

(a) *Calvert v. Tomlin*, 5 Bing. 1; *Cowie v. Allaway*, 8 T. R. 257; *Heath v. Brindley*, 2 Ad. & El. 365.

the first day of the past term; but here is an application in Easter Term to enter up judgment against a party who died in Hilary Term: that could not have been done under the old rules.

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 MANN
 v.
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PARKE, B.—Judgment nunc pro tunc applied to cases where there was a delay of the Court, who would not suffer the party to be prejudiced thereby.

Rule refused.

BARTON v. RANSOM.

PETERSDORFF having obtained a rule to set aside an award, on the ground that it was not final,

A rule to set aside an award must be drawn up on reading the award.

Erle shewed cause, and objected that the rule was not drawn up on reading the award, and therefore the award was not before the Court.

Petersdorff stated that he had observed the mode in which the rule was drawn up, and had mentioned the objection at the sitting of the Court, when the officer reported that it was the practice to draw up the rule as it had been done.

PER CURIAM.—The rule must be discharged.

Rule discharged.

1837.

CORRELL v. CATTLE.

Particulars of demand stated the action to be brought to recover the deposit paid upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out for better particulars, which was dismissed, upon the plaintiff's attorney stating that the objections were matters of law only. Subsequently, a notice was delivered to the defendant's attorney, that the objections were set forth in the plaintiff's answer to defendant's bill in Chancery. At the trial it appeared that the only objection was matter of fact. The Court refused a new trial, the defendant's attorney declining to make affidavit that he had been misled.

ASSUMPSIT for money had and received to the plaintiff's use. The particulars of demand stated the action to be brought to recover the sum of 30*l.* paid by the plaintiff to the defendant, as a deposit upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out before a Judge at chambers, for better particulars, specifying the objections to the title upon which the plaintiff meant to rely. This summons was attended by the plaintiff's attorney; and upon his stating that the objections were matters of law only, the summons was discharged. Subsequently, a notice was delivered to the defendant's attorney, stating that the objections to the defendant's title on which the plaintiff meant to rely were those fully set forth in the plaintiff's answer to a bill filed by the defendant in the Court of Chancery for a specific performance. At the trial before Lord *Abinger*, C. B., at the last assizes for the county of Warwick, it appeared that the defendant was tenant in tail of the property in question; and the objection to the title was, that he had executed a deed assigning his life interest upon certain trusts. This deed the defendant alleged to be a forgery. It was objected by the defendant's counsel that the plaintiff could not go into evidence of the deed being valid, since he had confined himself, by his particulars and subsequent notice, to matters of law only. A verdict having been found for the plaintiff for the amount of the deposit,

Hill moved to set aside the verdict upon this and other points reserved. He contended that the notice operated as an agreement between the parties, that no objection should be raised to the title, except matters of law.

PARKE, B., inquired if the defendant's attorney would make an affidavit that he verily believed the plaintiff meant to confine himself at the trial to points of law only, and did not come prepared to meet matters of fact; which being answered in the negative, his Lordship observed, that, according to strict rule, a summons should have been taken out to rescind the undertaking upon which the Judge at chambers refused to order further particulars; but as it appeared the defendant had not been misled, the rule must be refused upon that ground.

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ABINGER, C. B.—If application had been made to me for particulars, and I had known that the objections to the title were specified in the answer in the Court of Chancery, I should have refused the particulars.

Rule refused.

BEALE v. OVERTON.

THIS was a sheriff's rule under the Interpleader Act. It appeared that the sheriff had seized the goods on the 25th of November, and on the 28th he received a notice that they were not the property of the defendant, but had formerly belonged to the defendant's wife, and had passed to her trustees under a marriage settlement.

Where the seizure was on the 25th of November, and the sheriff received notice on the 28th:—*Held*, that he should have applied to the Court for relief, so as to have enabled the parties to have shewn cause in the following term.

Humfrey, on behalf of the execution creditor, and *Willmore*, on behalf of the claimants, contended that the application was too late. They referred to *Cooke v. Allen* (a), and *Ridgway v. Fisher* (b).

If the sheriff is guilty of laches in making his application, he must pay the costs of both parties.

Butt, on behalf of the sheriff, submitted that no inconvenience had arisen from the sheriff omitting to apply at an earlier period.

(a) Ante, Vol. 2, p. 11.

(b) Ante, Vol. 3, p. 567.

1837.

BEALE
v.
OVERTON.

PARKE, B.—The sheriff has come too late, and must pay the costs of both parties. He ought to have applied within such time in the following term as to have enabled the parties to have shewed cause in the term.

ALDERSON, B.—In a case like the present, the sheriff will not be safe unless he applies within the first four days of the term.

Rule discharged, with costs.

JONES v. HOWS.

A plaintiff having withdrawn the record in consequence of the absence of a witness, on a subsequent day gave fresh notice of trial. Prior to the day of trial under this second notice, the defendant moved for judgment as in case of a nonsuit, having given one day's previous notice only. The plaintiff tried his cause as undefended, and obtained a verdict:—*Held*, that the verdict was an answer to the motion; but the Court, on discharging the rule, set aside the verdict on payment of the costs thereof, and the costs of the rule, the plaintiff giving a peremptory undertaking.

HOGGINS shewed cause against a rule obtained by *Addison* for judgment as in case of a nonsuit. It appeared from the affidavit, that notice of trial had been given for the 31st of March last, but the record was withdrawn in consequence of the absence of a material witness. On the 10th of April, the plaintiff gave a fresh notice of trial for the 18th; and, pursuant to that notice, tried the cause, and obtained a verdict, the defendant not appearing. On the 14th of April, the defendant moved for judgment as in case of a nonsuit, having previously given one day's notice of the motion. It was submitted that, as the plaintiff had obtained a verdict, the Court could not give judgment as in case of a nonsuit, since there would be two inconsistent entries on the record.

Addison, in support of the rule, contended that, as the plaintiff had failed to go to trial pursuant to the practice of the Court, the defendant was entitled to judgment as in case of a nonsuit, notwithstanding a verdict. *Smedley v. Christie* (a) decided, that where a defendant

costs thereof, and the costs of the rule, the plaintiff giving a peremptory undertaking.

(a) Ante, Vol. 2, p. 152.

is entitled to judgment as in case of a nonsuit for not giving notice of trial, he is not deprived of his right by the plaintiff giving notice before motion made. The same rule was held in *Bainbridge v. Purvis* (a). [Parke, B.—The notice was not a stay of proceedings: you might have shewn cause in the first instance.] In the other courts, one day's notice is sufficient in all cases; and the rule of 2 Reg. Gen. H. T. 2 Will. 4 (b), will by implication make the notice in each Court a stay of proceedings.

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JONES
v.
HOWS.

PARKE, B.—We cannot make the rule absolute when the plaintiff has obtained a verdict. It is the fault of the defendant, in making a motion which would not operate as a stay of proceedings. The rule must be discharged; but it may be incorporated in the rule that the verdict is to be set aside upon the payment of the costs thereof and of the costs of this rule, the plaintiff giving a peremptory undertaking.

Rule accordingly.

(a) Ante, Vol. 1, p. 444.

(b) Ante, vol. i. p. 187.

ROBINSON v. CRESWELL.

UDALL moved for a rule calling on the warden of the Fleet Prison to discharge the defendant out of custody, on the ground of his being supersedable. The 88th section of 1 Reg. Gen. H. T. 2 Will. 4 (a), orders that all prisoners who shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedable, although not superseded, shall be *forthwith* discharged out of the King's Bench or Fleet Prison, as to all such actions in which they shall be supersedable. Here, the defendant was supersedable above a month, in

The marshal or warden is not bound, under 1 Reg. Gen. H. T. 2 W. 4, s. 88, to discharge a prisoner who is supersedable, without an order of the Court or a Judge.

(a) Ante, Vol. 1, p. 195.

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v.
CRESWELL.

consequence of not having been charged in execution, and had applied to the warden to release him from prison; which application had been refused. It was submitted, that under the above rule the warden was bound to discharge the defendant.

LORD ABINGER, C. B.—We cannot make the warden judge of the fact as to whether or not the defendant is supersedable. You may take a rule against the plaintiff.

ALDERSON, B.—The defendant should have applied to a Judge to discharge him.

On the following morning, *Mansel* moved to charge the defendant in execution, against which rule *Udall* shewed as cause that the other rule had been obtained; but the Court thought the objection insufficient, stating, that the defendant was guilty of neglect in not applying sooner for his discharge.

MILLER'S Bail.

Where bail swore that they were worth property "over and above all their just debts," instead of "over and above *what will pay* all their just debts," as prescribed by 1 Reg. Gen. 2 W. 4, s. 19, the objection was held sufficient to release the plaintiff from the costs of opposition, the bail having justified.

RATHBONE opposed the bail in this case, on the ground that the affidavit of justification was insufficient. The objection was, that the bail had sworn that they were worth property to the amount of 50*l.* "over and above all their just debts," instead of "over and above *what will pay* all their just debts," as required by 1 Reg. Gen. H. T. 2 Will. 4, s. 19 (*a*).

Mansel, in support of the bail, contended that the omission of the words "what will pay," did not alter the sense of the affidavit.

(*a*) Ante, Vol. 1, p. 185.

THE COURT held that the form prescribed by the rule should be strictly pursued, though the objection would not prevent the bail justifying; but the only effect would be; that the plaintiff would not have to pay the costs of opposition in case they justified (a).

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MILLER'S
Bail.

The bail afterwards justified.

(a) But see Hunt's Bail, ante, Vol. 4, p. 272.

HALL v. PIERCE.

THE defendant being sued on a promissory note, put in a plea, and afterwards obtained a summons to stay proceedings, upon payment of debt and costs within a limited time, or the plaintiff to be at liberty to sign final judgment. The costs not being paid, the plaintiff signed final judgment, and sued out a ca. sa. for the purpose of fixing the bail. The defendant rendered in discharge of his bail, and was afterwards superseded. The plaintiff then brought an action on the judgment; to which the defendant, after obtaining time to plead, pleaded nul tiel record.

Where a defendant has been superseded through the neglect of the plaintiff, the Court will not allow him the costs of an action on the judgment, although the defendant has caused expense and delay by pleading a false plea.

Archbold now moved to allow the plaintiff his costs. The 43 Geo. 3, c. 46, s. 4, deprives the plaintiff of costs in an action on a judgment, unless the Court or one of the Judges shall otherwise direct. He submitted, that as the defendant had pleaded a false plea, and had caused expense and delay, it was a case in which the Court would interfere.

PARKE, B.—The plaintiff is seeking to rectify his blunder in not having charged the defendant in execution. The question then is, whether the defendant ought to pay, or the plaintiff to suffer the consequences of his own negligence. If the costs could be separated, the defend-

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ant ought to bear the expense of his false plea ; but the act gives no power for us to award part of the costs.

Rule refused.

BELBIN v. BOTT.

In *debt*, payment cannot be given in evidence in mitigation of damages, but must be pleaded.

DEBT for goods sold, and money due on an account stated. Plea *nunquam indebitatus*. At the trial before the under-sheriff of Hampshire, the plaintiff proved the sale of a carriage ; and on the part of the defendant, a promissory note for the amount claimed was produced, and evidence was tendered to prove that the note was paid subsequently to the commencement of the action. It was objected that this evidence could not be received, there being no plea of payment. The under-sheriff received the note, and left it to the jury to say whether it was given on account of the debt ; and whether the plaintiff, by accepting it, had not precluded himself from enforcing payment of his claim until the note became due. The jury having found a verdict for the defendant, *Addison* moved for a new trial, unless the defendant would consent to a verdict for nominal damages.

Robinson shewed cause.

PARKE, B.—How could the note be given in evidence in reduction of damages in an action of debt, where there is no inquiry as to damages ? It has been held (a), that in an action of assumpsit, payment may be given in evidence in mitigation of damages ; but that cannot be done in debt. The rule must be absolute for a new trial, and the defendant may amend upon payment of the costs of the former trial.

Rule accordingly.

(a) See *Shirley v. Jacobs*, ante, Vol. 4, p. 136.

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DOE *d.* MORGAN *v.* ROE.

ERLE having obtained a rule to set aside judgment against the casual ejector for irregularity, on the ground that the judgment was signed without an appearance having been entered,

Sir *W. Follett* shewed cause.—In Tidd's Practice (a) it is stated, that "previously to signing judgment, common bail must be filed for the casual ejector in the King's Bench by *bill*, though it does not seem necessary to enter an appearance for him by *original*," and reference is made to a rule of M. T. 33 Car. 2. There is, however, no such rule in this Court; and in the Common Pleas it has never been the practice to enter an appearance. The 5 Geo. 2, c. 27, which gave to a plaintiff power to enter an appearance for a defendant, does not apply to actions of ejectment; because, in order to proceed under that statute, the defendant must have been served with a copy of the writ.

In this Court, there is no rule requiring an appearance to be entered for the casual ejector, previously to signing judgment against him; and if such appearance be entered, the costs thereof will not be allowed on taxation.

Erle, in support of the rule.—It is clearly necessary in the King's Bench to enter an appearance, and a form for that purpose is found in the books. In this Court, the proceedings are analogous to those in the King's Bench; and it is stated, both in Chitty's Archbold (b) and in Hussey's Practice, that an appearance should be entered for Richard Roe.

PARKE, B.—The officer certifies that there is no such practice in this Court; although, when an appearance has been entered, it is allowed on taxation of costs. As there is no such practice, it should be understood that in future no appearance will be required; and if entered, the costs of it will not be allowed.

Rule absolute, on payment of costs.

(a) Vol. 2, p. 1224.

(b) P. 537.

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When the venue has been retained on an undertaking to give material evidence in the county, and the plaintiff omits to do so, the objection must be taken at the trial.

How v. PICKARD.

THIS was an action against a wharfinger for negligence. The venue was laid in Lincolnshire, and on motion to change it to Yorkshire, it was retained on the usual undertaking to give material evidence in Lincolnshire. A verdict having been found for the plaintiff, *Balguy* moved to set it aside and enter a nonsuit, on the ground that the plaintiff had not given material evidence in the county of Lincoln according to his undertaking. He admitted the objection was not taken at the trial.

PARKE, B.—It is now too late. If the objection had been made at the trial, the plaintiff might have produced material evidence in the county of Lincoln.

Rule refused.

LILLEY v. JOHNSON.

On shewing cause against a motion for a new trial in a case tried before the sheriff, affidavits are admissible stating facts proved at the trial, but which do not appear upon the sheriff's notes.

COTTINGHAM moved for a new trial, in an action which was tried before the under-sheriff of Yorkshire, on the ground that the verdict was against evidence.

G. T. White shewed upon affidavits stating certain facts to have been proved at the trial, which did not appear upon the under-sheriff's notes.

Cottingham confessed that if the affidavits were admissible, his objection was answered.

THE COURT said the affidavits were admissible, and discharged the rule.

Rule discharged.

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SMITH v. ANDREWS.

W. H. WATSON obtained a rule calling on the plaintiff or his attorney to shew cause why they should not refund to the constable of Dover Castle the sum of 79*l.* 9*s.* 2*d.*, paid by him to the plaintiff's attorney in lieu of an attachment. The defendant was arrested on the 8th of November, and executed a bail bond on the 10th. On the 15th of November the sheriff was ruled to return the writ, upon which he returned *cepi corpus*, and on the 22d of November a body rule issued. On the 6th of December the plaintiff's attorney was served with a notice of bail having been put in, and that they would justify at chambers. The notices were returned by the plaintiff's attorney, on the ground that the body rule had expired; and on the 17th of December other notices were sent that the bail would justify at chambers on the 23rd. On that day the plaintiff's attorney attended at the Judge's chambers, and the bail were rejected, the notices not being regular. On the 23rd of December a new notice of bail was served to justify on the 30th, but on that day no judge was at chambers. Upon the 3rd of January another notice was served to justify on the 5th of January, on which day the parties attended at the Judge's chambers, when the plaintiff's attorney protested against the justification of the bail, on the ground that the constable was fixed, but the learned Judge permitted the bail to justify. On the 11th of January the plaintiff's attorney made application to the agent of the constable of Dover Castle for payment of debt and costs, alleging that the constable was in contempt; but in his bill of costs, he made no charge for attending at chambers to oppose the bail. The debt and costs were accordingly paid; and at the same time the agent wrote to the plaintiff's attorney stating that he had paid the money, assuming the constable to be in contempt, and that the plaintiff was in a

The constable of Dover Castle being in contempt for not bringing in the body, the plaintiff attended a justification of bail at chambers under protest of irregularity; the bail justified, and the plaintiff afterwards received the debt and costs from the constable under threat of an attachment:—*Held*, that opposing the bail was no waiver of the contempt; and that the plaintiff was, notwithstanding, in a situation to move for an attachment.

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situation to move for an attachment against him. Upon these facts, it was objected that the money was improperly obtained from the constable, inasmuch as the plaintiff's attorney, at the time he received it, was not in a condition to apply for an attachment.

F. Kelly shewed cause.—The justification of bail at chambers was a mere nullity; and the plaintiff was entitled to move for an attachment on the first day of term. The justification being irregular, the plaintiff's attorney has done no act to render it good; but, on the contrary, he refuses to receive the notices, and distinctly states that the constable is fixed: and when he did attend at chambers, he protests against the irregularity of the proceedings. Bail cannot justify at chambers unless by consent, and the attending and opposing them was no waiver. *Hawkins v. Plomer* (a). The contempt was incurred when the body rule expired; and nothing that the constable could do, except by consent, could purge it. *Holt v. Meddowcroft* (b) is the same in principle as the present case. The plaintiff was not bound to communicate to the constable a justification which was a nullity; but if the charges for attending at chambers to oppose the bail had been inserted in the bill of costs, it does not necessarily follow, that instead of paying the money the constable would have applied to the Court to set aside the attachment on payment of costs.

W. H. Watson, in support of the rule.—The plaintiff was not in a condition to move for an attachment upon the first day of term. There was no order to bring in the body, but a rule to bring in the body under the old practice; and if bail is put in at any time before an attachment is moved for, the sheriff is relieved: *Rex v. Sheriff of Middlesex* (c). The rule of H. T. 3 W. 4 (d), relating

(a) 2 W. Black. 1064.

(b) 4 M. & S. 467.

(c) 2 M. & S. 562.

(d) Ante, Vol. 1, p. 732.

to cases in which a bailable writ expires in vacation, applies to an order of a Judge, and not to a rule to bring in the body. It is true that bail cannot justify at chambers, unless by consent; but in the present case, the plaintiff's attorney attended, and took objection to the bail. Then there has been an improper concealment of the fact in the bill of costs. If the constable had been aware that bail had justified, he would not have paid the money.

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PARKE, B.—I am of opinion, upon the facts, that the plaintiff was in a condition to move for an attachment on the first day of Hilary Term. This application cannot be granted either in the form or upon the ground on which it is applied for. It is most probable, that the constable never would have paid the money, if the charges for opposing the bail had been inserted in the bill of costs. The rule must be suspended until the defendant or his bail apply to the Court to set aside proceedings; and then this rule will be discharged without costs. If no such application can be made, the plaintiff's attorney must recover all proper costs, to be taxed by the Master, out of the 99*l.* 7*s.* 2*d.*, and refund the residue.

In the Matter of the Effects of MOSES ROBINSON, deceased.

THE *Attorney-General*, on moving to make absolute a rule calling on executors to account, prayed that, in the present case, and in future, it might form part of the rule, that "if, upon the delivery of the account of the testator's property, there should be found to be any duty payable to his Majesty, that the executor should pay the costs of the Crown in the matter; such costs to be taxed in the usual manner." Before the passing of the 42 Geo. 3, c. 99, s. 2, there were two modes of enforcing the payment of legacy

Upon making absolute a rule calling on executors to account for legacy duty, the Court ordered, that in future it should form part of such rules, that "if, upon the delivery of the account, there should be found to be any duty

payable to his Majesty, that the executor should pay the costs of the Crown, to be taxed in the usual manner."

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duty: the one by information at the suit of the Attorney-General in this Court; the other, by information in a court of equity. Since that act, the practice had been, for the comptroller of the legacy duties to send five letters to the executor; and if he did not then render an account, an application was made to this Court for a rule nisi. If the executor did not appear, the rule was made absolute that the executor should, within eight days after the service thereof, duly account to the Commissioners of Stamps; and should, within the same time, pay the duty chargeable, and the costs of the Crown. Doubts had arisen as to whether the Court had power to award costs, unless it should turn out that duties were payable. Lord Abinger, C. B., in a case at Gray's Inn Hall, directed that the question of costs should be reserved until the executor rendered his account. The inconvenience of this was, that it became necessary to make a second application to the Court for the costs; by which great expense was incurred. This would be remedied by making a conditional order that the costs should be paid, if it should turn out that duties were due to the Crown. The 42 Geo. 3, c. 99, s. 2, enacted, that in every case in which any executor or administrator should not have paid the duties payable in respect of any legacies, or any personal estate, &c. of any person dying intestate, pursuant to the 36 Geo. 3, c. 52, or any other act or acts relating to legacies or shares of personal estate, within proper and reasonable time, it should be lawful for his Majesty's Court of Exchequer, on application made on behalf of the Commissioners of Stamps, on such affidavit or affidavits as to the Court might appear to be sufficient, to grant a rule requiring such executor or administrator to shew cause why he should not deliver to the Commissioners an account, on oath, of all the legacies, or of the personal property respectively paid or to be paid or administered by him, and why the duties on any such legacies, or any shares or residue of any such personal estate had not been paid,

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or should not forthwith be paid. Then the 53 Geo. 3, c. 105, s. 3, enacts, that in all actions, bills, plaints, informations, and proceedings, had, prosecuted, entered, or filed in the name of his Majesty, or in the name of any person on his behalf, for the recovery of any duties, debts, or penalties granted or payable by or under any act or acts of parliament relating to the duties under the management of the Commissioners of Stamps, it shall be lawful for his Majesty to have and recover such duties, debts, and penalties, *with full costs of suit, and all charges attending the same*. In *Rex v. Amery (a)*, which arose on a quo warranto, it was held, that under the 9 Anne, c. 20, the Court, in giving judgment for the relator, was at the same time bound to give judgment for the costs. [Lord Abinger, C. B.—This is a delicate proceeding, against executors, who ought to be protected: there are many instances in which they would have no right to charge these costs in their account to the estate. Suppose an executor renders an account to the commissioners, and they differ as to the legal effect of that account; it would then be necessary to take further proceedings, by an information either for the duties or the penalties; and then, if the point was found for the Crown, there is no doubt the Crown would be entitled to costs. *Alderson, B.*—The difficulty, in my mind, is, that you are asking for costs on the decision of the commissioners, and not on the decision of the Court.] It is only where the executor and commissioners agree, that the order is final.

On a subsequent day, Lord ABINGER, C. B. said,—We think there is no objection to making the rule in the form prayed for by the Attorney-General: it will save the expense of any further application.

Rule absolute, in the form prayed for.

(a) 1 Anst. 178.

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LEACH, Esquire, v. THOMAS.

Where several breaches are assigned, some of which are bad, and the jury give general damages, the Court will not arrest the judgment, but will award a *venire de novo*.

ASSUMPSIT. The declaration stated that the defendant, being about to quit a farm, which he held of the plaintiff, at Michaelmas next, the plaintiff undertook to see him paid, by the in-coming tenant of the said farm, for dressing the fallow, 5*s.* an acre for the first ploughing, and 3*s.* an acre for every other ploughing, and after the rate of 2*s.* an acre for draying the same; and it was also agreed that the defendant should be paid for the grass seeds sown in the ground of the said farm that year, and 1*s.* a load for dung when driven on the land; and that if the in-coming tenant should wish to purchase the clover-hay, or any meadow-hay, each should fix on a person to value the same; and that the in-coming tenant should purchase the corn at a valuation. And the said agreement being so made, a treaty was entered into between the plaintiff and the defendant for the retaking of the said farm; and thereupon, by a certain other agreement between the plaintiff and defendant, the plaintiff agreed to let the said farm to the defendant, from Michaelmas then next, as a yearly tenant, for the sum of 180*l.* and 1*l.* 10*s.* land-tax, provided the defendant should find sufficient securities for the regular payment of the rent: and it was further agreed, that, when the defendant should quit the said farm, he should not carry away or dispose of any straw, either threshed or unthreshed, or thatch, or any dung the produce of the said farm, or on the said farm at the time the defendant should quit; and that the defendant should keep the house and fence of the said farm in good repair, and should commit no waste on the said farm. The declaration then averred mutual promises; and that the defendant became yearly tenant of the farm, from Michaelmas 1832 to Michaelmas 1834, on the terms in the second agreement mentioned; that the plaintiff was ready

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to perform the stipulations in the first agreement mentioned; and that the in-coming tenant wished to purchase of the defendant all the clover-hay and meadow-hay and corn of the farm; and that plaintiff was ready to fix on a person to value it, and requested defendant to fix on a person for that purpose, and to sell the same to the in-coming tenant on the terms mentioned in the agreement. The declaration then proceeded to assign, among other breaches, thirdly, that the defendant *threatened* to carry away from the farm, or to dispose of, dung the produce of the farm, unless the in-coming tenant paid him 100*l.* for the same, and thereby compelled the in-coming tenant to pay the said money, to prevent the said dung from being carried away: fourthly, that he threatened to carry away the said dung, unless he was paid divers monies exceeding 1*s.* a load: and, sixthly, that he threatened to commit further waste, if the in-coming tenant did not pay him 20*l.*; and that the in-coming tenant was thereby compelled to pay the same. The defendant, by his pleas, traversed these breaches respectively; upon which issue was joined.

At the trial before Patteson, J., at the Pembrokeshire Summer Assizes, in the year 1835, a general verdict was found for the plaintiff on all the breaches, with 20*l.* damages.

Evans having obtained a rule to arrest the judgment, on the ground that the third, fourth, and sixth breaches were bad,

E. V. Evans and *Leach* shewed cause.—Admitting the breaches to be bad, the defendant is not entitled to arrest the judgment, but only to have a *venire de novo*. In *Tidd's Practice*, 922, it is laid down as one among other cases in which a *venire de novo* is grantable, “when the jury give general damages on a declaration consisting of several counts, and it afterwards appears that one or more

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of them is defective." There are several authorities in support of this position—*Eddowes v. Hopkins* (a), *Grant v. Astle* (b), *Angle v. Alexander* (c), *Richardson v. Melish* (d), *Day v. Robinson* (e). In *Trevor v. Wall* (f), the Court undoubtedly refused a venire de novo, and arrested the judgment. [Parke, B.—That was because a court of error could not award a venire where the proceedings originated in an inferior court.]

Evans, contra.—*Holt v. Scholefield* (g), is a distinct authority in favour of arresting the judgment. *Sicklemore v. Thistleton* (h), is to the same effect. *Eddowes v. Hopkins* was an application to amend the entry of the verdict by the judge's notes. In the other cases cited, the venire de novo was awarded by the court of error.

PARKE, B.—This case must go down again. We know the defendant has been guilty of all the breaches, but cannot tell to what amount on each. *Holt v. Scholefield* must be considered as overruled as to this point. If the court of error can grant a venire de novo in a case like the present, à fortiori a court with original jurisdiction may do it. Without the parties can come to terms, the rule must be absolute for a venire de novo.

ALDERSON, B.—This point was not argued in *Holt v. Scholefield*. Though *Grant v. Astle* was referred to, the whole argument was addressed as to the sufficiency of the declaration.

Venire de novo awarded.

(a) Doug. 377.

(b) Doug. 722.

(c) 3 Bing. 349.

(d) 7 Bing. 119.

(e) 1 Adol. & E. 554.

(f) 1 T. R. 151.

(g) 6 T. R. 691.

(h) 6 M. & S. 9.

COURT OF COMMON PLEAS.

Easter Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

DOE d. DAFNEY v. SINCLAIR.

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MANSEL moved for the discharge of the defendant out of custody, under the Small Debtors' Act, 48 Geo. 3, c. 123, s. 1. It was an action of ejectment, and a verdict had been returned for the lessor of the plaintiff, with 1*s.* damages. The increased costs amounted to 24*5*l. 19*s.*, and the defendant had been taken in execution for them and the damages. Costs merely were not within the Act; for its words were, "debt or damages" exclusive of costs. The defendant having been in custody for more than twelve months, in respect of damages less than 20*l.*, was therefore entitled to his discharge. He cited *Doe dem. Threlfall v. Ward* (a), where damages in ejectment were held to be within the Act.

A defendant in execution for 1*s.* damages, and costs exceeding 20*l.*, is, nevertheless, entitled to his discharge under the 48 Geo. 3, c. 123, s. 1, after having been in custody for twelve months.

Butt shewed cause in the first instance, the usual notice having been given. He cited *Doe v. Reynolds* (b), where a party in execution for the costs in an action of ejectment exceeding 20*l.* was held not to be entitled to his discharge.

Mansel, contra.—There was a case in the King's Bench, *Doe v. ———* (c), where the Court gave a decision in accordance with that of the Court of Exchequer.

(a) 2 M. & W. 65.

(b) 10 B. & C. 481.

(c) 1 D. P. C. 69.

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TINDAL, C. J.—The words of the Act are, “all persons in execution upon any judgment for any debt or damages not exceeding the sum of 20*l.*, *exclusive* of the costs recovered by such judgment, and who have lain in prison,” &c. That puts an end to the question: the rule must be granted.

Rule granted accordingly.

STALEY v. LONG.

In trespass quare clausum fregit, the defendant pleaded, first, not guilty; secondly, the plaintiff not possessed; thirdly, right of ways: verdict for him on the third issue, but for the plaintiff on the two first, with 1*s.* damages: the defendant, having substantially succeeded in the cause, is entitled to the postea.

TALFOURD, Serjeant, on a former day, had obtained a rule calling on the plaintiff to shew cause why the postea should not be delivered to the defendant, and why the prothonotary should not tax the defendant his general costs in the cause.

Ludlow, Serjeant, shewed cause.—It was an action of trespass brought against the defendant for breaking and entering the plaintiff's close: and the pleas were, first, not guilty; secondly, that the plaintiff was not possessed of the close; and, thirdly, a right of way. At the Summer Assizes, 1836, a verdict was returned at the trial for the plaintiff, on the first two issues, with 1*s.* damages; and for the defendant on the last issue. The postea had been delivered to the plaintiff; and the ground of application was, that the defendant had substantially succeeded in the action, and that he was, therefore, entitled to the postea. It was now contended that the plaintiff had recovered damages; and therefore, strictly speaking, had a right to the possession of the postea, and was entitled to the general costs. *Smith v. Edwards* (a).

Tindal, C. J.—But was he entitled to those damages, the issue on the right of way having been found against him?

(a) Ante, Vol. 4 p. 621.

Ludlow, Serjt.—That was a matter into which the Court could not now inquire, the time in which the interference of the Court would have been justifiable having passed long since. It was admitted that the defendant was entitled to receive some relief at the hands of the Court; but it was urged that he asked too much in demanding the *postea*.

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TINDAL, C. J.—It appears to me that the first and second issues, on which the plaintiff has succeeded, were beside the real merits of the case; for the substantial question between the parties was the right of way. Upon that issue, I am inclined to think that the defendant will be entitled to receive costs; for the great burden of expense would lie upon its proof. The jury having found nominal damages, the associate thought that he was the party entitled to the *postea*. All the future stages of the cause will, however, be conducted by the defendant; and, therefore, I think the rule should be absolute for the delivery of the *postea* to the defendant.

PARK, J., concurred.

BOSANQUET, J.—The defendant has substantially succeeded in the action; and I think the officer should not have delivered the *postea* to the plaintiff.

COLTMAN, J., was of the same opinion.

Rule absolute.

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LINDSAY v. WELLS.

Where the plaintiff in the declaration on a bill of exchange and promissory note was described as Henry H. Lindsay, the Court refused to set aside the declaration for irregularity, the defect being held to be cured by the 3 & 4 Will. 4, c. 42, s. 12.

W. H. Watson shewed cause against a rule which had been obtained on a former day by *Thomas*, to set aside the declaration for irregularity, or to amend the declaration at the cost of the plaintiff.

It was an action brought on five bills of exchange and a promissory note; and the objection to the declaration was, that the plaintiff was styled therein "Henry H. Lindsay," his second Christian name not being set out. An affidavit was now produced, in which it was sworn that the plaintiff was resident in the United States of America, and that the action was brought by virtue of a power of attorney which had been sent to the attorney on the record, and in which the plaintiff was described precisely as he was styled in the declaration. The affidavit on which the rule had been obtained did not allege that there was any ending to the plaintiff's second name; and it must be assumed, therefore, that the plaintiff had no other name than "H." The act (a) provided, that no plea in abatement in any personal action should be pleaded for a misnomer, but the defendant should be at liberty to cause the declaration to be amended at the cost of the plaintiff, on a Judge's summons upon an affidavit of the right name. Here, no Judge's summons had been taken out for amending the declaration, but for setting it aside on the ground of irregularity, and there was no affidavit of the right name. The defendant was under no disadvantage in consequence of the supposed irregularity; and if he came to the Court upon a technical objection, he must come properly. It was sworn on the part of the plaintiff, that it was not known here whether he had any second name or not.

Thomas urged, that the objection was a legal as well as a reasonable one. It could not be any hardship on the

(a) 3 & 4 Will. 4, c. 42, s. 11.

plaintiff to call upon him to give his right name, which no one could know better than himself. The defendant had already received the benefit of being discharged out of custody on a similar objection, having been arrested on an affidavit of debt, in which the plaintiff was described as he now was. The section of the Act of Parliament, it was urged, had not reference to the misnomer of a plaintiff as well as a defendant.

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TINDAL, C. J.—The rule must be discharged with costs, but the defendant may take a week's time to plead. The section succeeding that already referred to evidently governs the case; for it is said, that, in actions on written instruments, any of the parties to which are designated by the initial letter of the Christian name, they may be described in the same manner in the process and declaration (*a*).

Rule discharged.

(*a*) It did not appear in what character the plaintiff sued, but he was in reality only the holder of the bill.

FOSTER v. ALLENBY.

WILDE, Serjt., had obtained a rule nisi, calling on the plaintiff in this action to shew cause why he should not proceed to trial of this action, notwithstanding the consolidation of it with others, brought by the same plaintiff, on the same policy of insurance.

Taddy, Serjt., shewed cause, and urged that the Court could not grant this application. There had already been two trials by special juries, in which the verdicts returned were alike; and the Court would not now, without any suggestion that any new evidence was to be produced, make the present rule absolute. The case would

Where a cause has been tried twice by special juries, and a verdict for the plaintiff returned on both occasions, the Court will not open a consolidation rule for the trial of another similar action; it not being shewn that the case had not been fully brought before the jury. Vaughan, J., dissentiente.

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be different if there had been any doubt of its merits having been fully before the juries who tried it ; but it was not suggested that that was the fact. He cited *Cohen v. Bulkeley* (a), and *Doyle v. Douglas* (b).

Wilde, Serjt., in support of his rule, said, that this application was to the equitable discretion of the Court. The first cause, it was true, had gone to trial twice ; and, on both occasions, the verdict was the same way : but an application was made for a third trial, and the Judges expressed no decided opinion upon the verdict, but were divided upon the point as to whether the rule should be granted. It would be unjust to bind the defendant in this action by a verdict which had not received the approbation of the Court. The agreement entered into by the defendant was, that a decision should be given which would meet the approbation of the Judges of the Court in which the action was brought. Here, no such approbation had been expressed ; for the ground on which the Court refused a new trial in the other cause was not on the merits of the case, but only upon a rule, which some of the Judges thought applied to the case.

Park, J.—Can you point out any instance where, after a second verdict the same way, the consolidation rule has been opened ?

Wilde, Serjt., did not recollect any such instance ; but he apprehended that this argument did not apply, for the Judges had said, that they would grant trial after trial where the verdicts were not satisfactory ; and it would be mischievous in the extreme to establish a contrary rule in such cases as the present.

(a) 5 Taunt. 166.

(b) 4 B. & Ad. 544.

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TINDAL, C. J.—I am of opinion, that, if we were to grant this application, it would be making a very dangerous precedent; for if the verdict in this case went the same way, we should have similar applications from all the other defendants, and the benefit of the rule would be lost. If there were any new evidence to be produced, or other such matter, the rule might be opened; but here, after two verdicts returned by special juries, both the same way, I think it would be improper to send the case back again, as the only question is one of fact. Whatever may have been my own private opinion with regard to the merits of the case, yet I think a private right must give way to public justice and convenience.

PARK, J.—I am of the same opinion; and I do not recollect any case in which, after two verdicts had been given the same way, a consolidation rule has been opened. There is no suggestion here that the merits of the case were not fully before the juries on both trials; and both juries were of the same opinion.

VAUGHAN, J.—I regret I cannot reconcile myself to the opinion that this consolidation rule should not be opened; and I cannot but consider this application as one to the sound discretion of the Court. It has been asked, whether there is any case in which, after two verdicts the same way, the Court have opened a consolidation rule? I, in answer to that question, ask also, whether there is any case in which, after two such verdicts, the Court have been divided in opinion upon the question of granting a third trial? It is important, no doubt, that there should be an end of all disputes. The parties in the original action have had two trials, and the plaintiff has had the benefit of the verdicts; but a third party now comes forward, and says, "Although I have been bound by my consent to the consolidation rule, yet I consented only to be bound by a

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verdict which should meet the approbation of the Court." The verdicts returned have not so met the approbation of the Court; and he is entitled to a trial of his cause. The plaintiff cannot be hurt, in the cause which has been tried, by the opening of the rule; and, under all the circumstances, I am not satisfied that the underwriter should be concluded by the verdicts which have already been given.

COLTMAN, J., was of opinion that the consolidation rule should not be opened; and that the present rule ought therefore to be discharged.

Rule discharged.

VESTRIS'S Bail.

Bail having been put in, but rejected, fresh bail cannot be received without leave obtained, though fresh notice shall have been given to the plaintiff.

ARCHBOLD appeared to oppose the bail, on the ground that they had been changed, without an order being obtained for that purpose.

Wightman, in support of the bail, admitted that they were not the same persons of whom notice had been originally given; but contended, that, the former bail who were put in having been rejected, in such a case it was necessary that the bail should be changed, and that leave to change them need not be obtained. The former bail were rejected because they were indemnified by the defendant's attorney. Notice of the present bail had been served.

Archbold referred to the 5th rule of 5 Reg. Gen. T.T. 1 Will. 4 (a), by which it was ordered, "That the bail of whom notice shall be given shall not be changed, without leave of the Court or a Judge." Here, notice of bail had been given, the bail had been opposed and rejected, and

(a) Ante, Vol. 1, p. 103.

these bail were offered without leave being obtained. He admitted that fresh notice had been received, but contended that it was of no avail.

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TINDAL, C. J.—The case must be governed by the practice in the Courts of King's Bench and Exchequer.

A communication was subsequently made to the Court, when

TINDAL, C. J., said:—On inquiry, we find that it is the rule in both the other Courts, that, after rejection, new bail cannot be substituted without a special order. The bail must be rejected.

Bail rejected.

Wightman then obtained a rule nisi for an order of the Court to change the bail.

Rule accordingly.



In re BRANSTON, Gent., One, &c.

WILDE, Serjeant, shewed cause against a rule which had been obtained by *Hoggins*, and which called on an attorney of the Court of King's Bench to shew cause why a bill delivered by him for business done should not be referred to be taxed by the prothonotary. The bill amounted to about 60*l.*, and the items which, it was contended, brought it within the jurisdiction of the Court, were for business done in preparing affidavits verifying the certificate of the taking an acknowledgment of a married woman under the Fines and Recoveries' Act, 3 & 4 W. 4, c. 74. It was admitted that,

Charges in an attorney's bill for preparing the acknowledgment of a married woman, and for attending before the commissioners, &c., under the 3 & 4 Will. 4, c. 74, do not render the bill taxable under the 2 Geo. 2, c. 28.

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under the former mode of proceeding in such matters, it was supposed that there was a cause in Court, and the bill would be taxable; but this peculiar jurisdiction, which the Court formerly had, would not render a bill taxable which contained charges for business done under the altered practice. All proceedings in the Court must be conducted by an attorney; but it was not necessary that a person, in order to transact such business as that for which these charges were made in the bill, should be an admitted officer of the Court.

TINDAL, C. J.—Persons might have been appointed commissioners who were not attornies.

Hoggins, in support of the rule.—The question really was, whether these were not charges for business done “at law or in equity,” which were the words used in the statute of 2 Geo. 2, c. 23, s. 23. It had been held, in *Winter v. Payne* (a), that drawing and engrossing an affidavit of debt, in order to hold a party to bail, and money paid for swearing, &c., were items which gave the Court jurisdiction over the bill in which they were contained; and the charges here were for “drawing and engrossing an assignment in lieu of acknowledgment of fine, and for attending the married woman before the commissioners, and examining her apart from her husband; for attending before the commissioners, when the affidavit was taken; attending to get the affidavit sworn; for money paid for oath and exhibit; attending to bespeak office copy of enrolment, and paid for the same.” These charges, surely, were of the same description as those in *Winter v. Payne*, and were sufficient to bring the bill within the Act, especially as the statute was, upon the authority of the case cited, to be construed liberally.

(a) 6 T. R. 645.

TINDAL, C. J. — But are they made for business done
“ at law ? ”

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Hoggins.—They were charges for business done in Court, and therefore were at law. The 85th section of the Fines and Recoveries' Act made the inrolment of the certificate of the taking an acknowledgment, and of the affidavit verifying the same, acts done in Court.

TINDAL, C. J.—Charges for inrolling a deed in the Court would not make a bill taxable.

Hoggins.—*Fearne v. Wilson* (a) was a decision that charges for attending at a lock-up-house, and obtaining the release of the defendant, and filling up the bail-bond, were charges at law, and sufficient to bring the bill within the statute. And *Smith v. Wattleworth* (b) was an authority that charges for business done in the Insolvent Court, in procuring the discharge of an insolvent, were also taxable items. Fees charged by an attorney for holding a court as steward of a manor were also taxable: *Lethbridge v. Luxmore* (c). The effect of all these decisions was to shew, that the Court would put a liberal construction on the Act of Parliament, and would draw charges, if possible, within what had been repeatedly called a “ beneficial statute.” The particular Act in question, the 3 & 4 Will. 4, c. 74, s. 89, provided, that the Court of Common Pleas should appoint an officer with whom the certificates should be lodged, and should make such orders and regulations as it should think fit touching the mode of examination to be pursued by the Commissioners under the Act, and the matters to be mentioned in such certificates, and the affidavits verifying the same; and touching

(a) 6 B. & C. 86.

(b) 4 B. & C. 364.

(c) 1 D. & R. 511.

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the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies; "and also of the fees or charges to be paid for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations." These provisions, it was contended, ought to bring the case within the statute.

PARK, J.—That clause has reference to the fees to be paid to the commissioners, for which, provision is made by the rule of Court of H. T. 4 Will. 4 (a).

TINDAL, C. J.—The rule must, in my opinion, be discharged. The first statute which relates to attornies' bills is the 3 Jac. 1, c. 7, s. 1, which requires all attornies to give a true bill to their masters or clients, or their assigns, of all charges concerning the suits which they have for them subscribed with their names, before they shall charge them with any of the same fees; and the statute 2 Geo. 2, c. 23, s. 23, provides, that no attorney shall commence or maintain any action for the recovery of any "fees, charges, or disbursements, at law or in equity," until certain things have been done. The quære is, Whether these statutes do not refer to charges incurred in the course of a suit?

I must admit, that I think the Court went very far in holding that the suing out a writ of *dedimus potestatem* (b) for the acknowledgment of a fine was within the statute; and if fines had continued, we must now have followed that rule. Then comes a new Act, 3 & 4 Will. 4, c. 74, from the very title of which it is apparent that the charges in the bill are not taxable. It is called, "An Act

(a) Ante, Vol. 2, p. 789.

(b) *Ex parte Prickett*, 1 N. R. 266.

for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance." Though the deed is required to be inrolled in Court, yet that is not a proceeding in a suit; for it is neither more nor less than a conveyance from one party to another.

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PARK, J.—The Act of 2 Geo. 2 is a beneficial Act, no doubt; but I think that its beneficial object has carried the Court to the very utmost verge of the authority given to it; and we are not authorized in carrying it further. This case does not seem to be a suit either at law or in equity, and is not brought within the vortex of the Act. There are many deeds inrolled in this Court, but that is only for the proper and safe custody of them, and the inrolment does not come within the Act.

BOSANQUET, J.—I am of the same opinion. It seems to me that none of the charges are incurred in respect of any proceeding at law, either actually commenced or in contemplation.

COLTMAN, J.—I am also of the same opinion.

Rule discharged, without costs.

The Archbishop of CANTERBURY *v.* DANIEL TUBB.

R. V. Richards and *Arnold* shewed cause against a rule, which had been obtained by *Wilde*, Serjt., and which called on the plaintiff to shew cause why an order of Mr. Justice *Gaselee*, bearing date the 14th April, 1835, for a stay of proceedings in this action, should not be rescinded;

The Court will not permit an inspection of an administration bond, at the office of the registrar in Doctors' Commons, to be deemed good

oyer, although a copy has been accepted by defendant's attorney, and the Ecclesiastical Court has refused to allow the bond to be produced at the office of the defendant's attorney.

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and why the defendant should not be deemed to have had sufficient oyer of a deed of which there was *profert* made in the declaration in the action, or why he should not be deemed to have had oyer, on its being produced to him at the office of the Registrar, at Doctors' Commons, the plaintiff undertaking to pay the defendant's attorney's costs for attending at the office to inspect the same. It was an action on a bond executed by the defendant to the Archbishop of Canterbury; and the condition of it was, that the administratrix of *Charles Tubb*, deceased, should cause a true inventory of the goods, chattels, and credits of the deceased to be made, and to be exhibited in the registry of the Prerogative Court of Canterbury on or before the 31st of March, 1832. The administratrix, however, absconded, and no inventory was exhibited; and two of the creditors of the deceased commenced proceedings on the bond in February, 1835, in the name of the Archbishop, but without his privity. No assignment had been executed, nor had any indemnity been given to the Archbishop. The declaration contained *profert* of the deed; but the usual oyer had not been given, as the record-keeper, in whose care it was, had refused to allow it to go out of his custody. A copy, however, had been given to the defendant, and had been received without objection; but a summons was taken out for the stay of proceedings until the defendant should have had oyer; and the order of Mr. Justice *Gaselee* was obtained that proceedings should be stayed until the original bond should be produced. It was now contended, that the mode of giving oyer suggested in the present rule was entirely inconsistent with the practice in such cases. Oyer, strictly speaking, was a production of any particular deed or document in Court; and the modern mode of giving oyer at the office of the attorney was only adopted for the sake of convenience. Great difficulty had at first been experienced in permitting the production of deeds to be

dispensed with under any circumstances; but this had been done when there was a sufficient excuse pleaded. *Read v. Brookman* (a). Here, the plaintiff had made a *profert*, but he had made no excuse for not bringing the bond into Court. If he had done so, the matter would have been on the record, and the proper steps might have been taken to object to it. From the case of *Thoresby v. Sparrow* (b), it appeared, that the Court had not the power to dispense with oyer, when the deed was pleaded. The present was an application, in fact, to get rid of the oyer; and it could not be granted. In the report of the case in *Strange* it was said, that it was the plaintiff's fault for bringing his action before he was in a condition to produce the deed; and that observation applied here, with double force, because the deed was in the possession of the plaintiff himself. A note to the case, as reported in *Strange*, was also cited, as well as the cases of *Totty v. Nesbitt* (c) and *Matison v. Atkinson* (d), referred to in a note in *Read v. Brookman*. The principle laid down in those cases was, that the Court could not dispense with oyer after *profert*, and that all they could do to assist the plaintiff was in his mode of declaring.

TINDAL, C. J.—We are in this position. We have process to make the officer produce the deed at a trial, but we have no power to make him produce it in any intermediate proceeding.

R. V. Richards.—The Archbishop of Canterbury must be treated as the plaintiff in this action; but the bond might have been assigned to the real plaintiff. In the case of the Archbishop of *Canterbury v. Robertson* (e), an assignment had been made. The assignment not hav-

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v.
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(a) 3 T. R. 151.

(b) 1 Wilson, 16; and 2 Strange, 1185.

(c) 3 T. R. 153.

(d) Ib.

(e) 1 C. & M. 690.

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ing been made here, it must be presumed that the action was brought without the consent of the Prerogative Court. The case of *White v. Montgomery* (a) was also cited. In Stephen on Pleading, pp. 73, 93, 94, oyer was clearly defined.

Wilde, Serjt., in support of the rule.—This is not a case in which an assignment should take place. It is an action brought in the name of the Archbishop, and the creditor had a right to sue in his name. *Archbishop of Canterbury v. House* (b). The giving oyer was matter of law; the mode of giving it was matter of practice. The Court was not limited as to the place wherein the deed was to be kept. The object of the rule was, not to procure an entire dispensation with oyer, but only that it might be given on certain terms. In *Tolty v. Nisbett*, Buller, J., said :—"All we can do for you is, to order that the production of a copy shall be oyer." That was strictly applicable to this case; for here, a copy had already been given, and had been received without any objection; but the defendant afterwards demanded oyer, knowing the difficulty the plaintiff would have if he were compelled to give it in the usual way. It was submitted, that such an objection ought not to be allowed to interfere with the rights of the parties, and to take from the plaintiff his remedy in this case.

TINDAL, C. J.—It seems to me that we have no power to substitute the mode of oyer suggested for that which has been established by custom; for the whole case bears so much the appearance of an excuse, that it should have been put upon the record. If the Court were to make this rule absolute, they would be deciding upon a mere motion on a point of practice: a most important matter,

(a) 2 Strange, 1198.

(b) 1 Cowper, 140.

as far as concerns the rights and privileges of the Ecclesiastical Court, because we should take away from it the power over proceedings on administration bonds; for although it is said that the creditor has a right to sue, yet that must be subject to some control of the Ecclesiastical Court, as, otherwise, the Archbishop might be rendered liable to the costs of many actions, without any default on his part. It appears to me, that the proper course to have been pursued would have been, to have applied for a *mandamus* for the production of the bond, when the real parties would be brought face to face; and it would then have been decided whether or not the Archbishop had any just reason for refusing to produce it. The rule must be discharged; but as the case is so obviously against reason, it must be without costs.

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PARK, J.—I am of the same opinion.

COLTMAN, J.—The giving over is an act to be done in Court; and the Court can only sit in Westminster. I, therefore, do not see how we can make a place out of Westminster a part of the Court. I quite agree that it is a reasonable application, and that there should be no costs.

BOSANQUET, J., concurred.

Rule discharged, without costs.

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TYLER v. CAMPBELL.

In an affidavit of debt it is sufficient to allege the claim to be due "on the balance of an account stated," without the words "and settled."

BARSTOW moved for a rule to shew cause why the bail-bond in this case should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt, the defendant entering a common appearance. The defect complained of was, that the affidavit, while it deposed the defendant to be indebted to the plaintiff "on the balance of an account stated," did not proceed to allege that it was "settled between them." It was quite consistent with this affidavit that no debt subsisted between the parties. The account might have been stated, and yet the defendant might have denied that any balance was really due from him to the plaintiff. He cited *Visger v. Delegal* (a), as in point.

PER CURIAM.—The form of a count in a declaration on such a claim on an account stated, has been pursued by the affidavit. We think, therefore, that it is sufficiently precise.

Rule refused.

(a) Ante, Vol. 1, p. 333.

But the Court will not amend an order for the Court of Chancery in a similar manner. Hargrave v. Hargrave 5 D. & L. 151; 4 C. B. 649.

POLE v. ROGERS.

Reported in 3 Bingh. N.C. 700; 4 Scott 479.

Under s. 4 of 1 W. 4, c. 22, the Court will allow witnesses to be cross-examined vivâ voce, by a commission executed abroad, when the application seems reasonable.

R. V. RICHARDS shewed cause against a rule nisi, obtained by *Wilde*, Serjt., requiring the defendant to shew cause why the order obtained by him for the examination of witnesses at Paris and Boulogne, pursuant to 1 Will. 4, c. 22, s. 4 (a), should not be amended, by adding thereto liberty for the plaintiff to cross-examine the wit-

(a) See 2 Dowl. Stat. 43.

nesses vivâ voce ; such examination to be reduced into writing, and returned with the commission to one of the secondaries of the Court. It was submitted, that, unless the usual course were pursued by written interrogatory, great inconvenience and expense to the parties would be the result.

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Wilde, Serjt., in support of the rule, submitted, that, according to the language of the section in question, this Court had power to grant the application ; for it enabled the Court, in any action therein depending, " to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or *otherwise*." That clearly gave authority to the Court to grant the present application. Having such authority, there was nothing unreasonable in the present rule. He cited *Duckett v. Williams* (a).

TINDAL, C. J.—In the present case, the application seems reasonable. There can be no difficulty in obtaining proper assistance for the proposed examination at Paris and Boulogne.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute, to add to Lord *Denman's* order that the plaintiff be at liberty to cross-examine vivâ voce, and to join in the commission ; defendant to be at liberty to add further questions to his interrogatories : the cross-examinations and answers to be reduced into writing, and returned with the commission.

(a) Ante, Vol. 1, p. 291.

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DOE *d.* CAPPS *v.* CAPPS.

The costs to be allowed to a mortgagee, where a mortgagor stays proceedings, under the 7 Geo. 2, c. 20, in an ejectment brought for the recovery of the mortgaged premises, are to be taxed as between party and party, and not as between attorney and client.

N. CLARKE had, on a former day, obtained a rule calling on the defendant to shew cause why the prothonotary should not review his taxation. It was an action of ejectment brought by the mortgagee to recover the possession of the mortgaged premises from the mortgagor, and the defendant had obtained the usual order for a stay of proceedings. The prothonotary, on taxing the costs, allowed them as between party and party; but it was contended that they should be taxed as between attorney and client.

Wilde, Serjt., now shewed cause.—He referred to s. 1 of the statute 7 Geo. 2, c. 20, under which the application was made; and contended that the costs had been rightly taxed. It was provided by that section, that any person having a right to redeem, who should, at any time pending an action, pay to the mortgagee, or bring into Court, in the event of his refusal, all the principal monies and interest due upon the mortgage, “and all such costs as had been expended, to be ascertained and computed by the Court, or proper officer appointed for that purpose,” the same should be deemed and taken to be in full satisfaction and discharge of the mortgage. Here, “costs” being spoken of without any particular reference to the mode of calculating them, they must be considered to be costs as generally known. He produced an affidavit, in which it was stated, that inquiries had been made in the Courts of King’s Bench and Exchequer, and it was ascertained that, in those Courts, the practice had never been to allow costs as between attorney and client. At the Six Clerks’ Office, Chancery Lane, similar inquiries had been made; and it had been learned that the costs are always there taxed as between party and party.

N. Clarke, in support of the rule.—His application in its terms was, that the prothonotary might review his taxation, and not that the costs should be taxed in any particular manner. He had written to Mr. Bunce, one of the Masters in the King's Bench, who had told him that the costs in such cases, in that Court, were taxed liberally, but not quite as between attorney and client.

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 ———
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The Prothonotary of the Court reported that the costs were taxed in the same manner in this Court.

TINDAL, C. J.—If the case were to be sent back for the costs to be taxed liberally, the parties could never agree as to the extent of liberality to be shewn.

N. Clarke cited *Nowell v. Roake* (a).

TINDAL, C. J.—That was a case before a jury : you are now before the Court. All that you have said shews the practice adopted in this case to be correct, and that the costs should not be taxed as between attorney and client. The practice has not been such as you represent for many years ; and the Court will not alter the established rule specially for this case.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

(a) 7 B. & C. 404.

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HOLLIDAY v. LAWES.

Under 1 Reg.
Gen., H. T.
2 W. 4, s. 93,
interlocutory
costs may be set
off against final
costs in the
same cause,
without re-
ference to the
attorney's lien.

WILDE, Serjt., shewed cause against a rule obtained by **Atcherley**, Serjt., requiring the defendant to shew cause why the Master's taxation should not be reviewed, and the plaintiff be at liberty to set off certain costs due to him against certain other costs claimed by the defendant. It was an action to recover the sum of 119*l*. had and received to the use of the plaintiff. He arrested the defendant; and a bail-bond was given. A rule to cancel the bail-bond, at the instance of the defendant, was afterwards discharged with costs; and the latter were taxed at 15*l*. Subsequently the defendant became bankrupt, and a fiat was issued against him. The plaintiff did not proceed in his action in due time, and the defendant accordingly signed judgment of non pros. The costs of this judgment were taxed at 9*l*. The object of the present application was, that so much of the costs of the discharged rule as amounted to the costs of the non pros. should be set off against them. It was submitted, that according to the language of 1 Reg. Gen. H. T. 2 W. 4, s. 93 (a), a set-off could not take place to the prejudice of the attorney's lien. The words of the rule were, "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." In *Doe d. Hope v. Carter* (b), a set-off of interlocutory costs against final costs had been allowed, but that was subject to the attorney's lien. From the language of the rule, however, it would appear, that the set-off of interlocutory costs was only to be against interlocutory costs, because inter-

(a) Ante, Vol. 1, p. 196.

(b) Ante, Vol. 1, p. 269.

locutory costs could not be considered as in the same degree.

Atcherley, Serjt., in support of the rule, contended, that the proviso in the rule of court clearly contemplated a set-off of interlocutory costs against final costs in the same cause, without reference to the attorney's lien.

TINDAL, C. J.—The language of the rule, we think, admits the construction sought to be put on it by the plaintiff. The present rule may therefore be absolute in its terms.

Rule absolute.

ERNEST v. BROWN.

R. Alexander moved for a rule to shew cause why the verdict found in favour of the plaintiff, with nominal damages, should not be set aside. It was an action of debt for goods sold and delivered. The particulars attached to the declaration were in this form :—"For a cart sold, 5*l.*; deduct the sum paid by Mr. Brown, 1*l.* 13*s.*; balance claimed, 3*l.* 7*s.*" To this, the defendant pleaded, never indebted beyond 3*l.* 7*s.*, and paid that sum into Court. At the trial, proof was sought to be given on the part of the defendant, that the sum of 1*l.* 13*s.*, mentioned in the particulars, had been paid on account of the cart. *Tindal*, C. J., before whom the cause was tried, thought that such evidence was not admissible, and therefore directed the jury to find a verdict for the plaintiff, with nominal damages. *R. Alexander* now contended that that direction was wrong; for the plaintiff, in his particulars, having admitted the payment of the 1*l.* 13*s.*, it was unnecessary to plead it, as had been decided in the case .

In *debt*, where there is no plea of payment, the admission in the particulars of a sum paid cannot be used in answer to the plaintiff's action.

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of *Coates v. Stevens* (a). In that case Mr. Baron *Parke* said, "There was no occasion to have pleaded payment of 10*l.*, because it was not claimed by the plaintiff; he claimed only a balance, after allowing 10*l.*" And, in *Shirley v. Jacobs* (b), it was held, that in assumpsit against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying the acceptance, in reduction of damages. The sum of 1*l.* 13*s.* being admitted in the particulars, it was unnecessary to give evidence of it.

TINDAL, C. J.—Both those cases were actions of assumpsit; and this is an action of debt. Here the defendant has pleaded that he "never" was indebted. The only mode in which he could be entitled to a verdict on that issue would be by shewing that the debt never did exist. He has not pleaded payment, and the admission in the particulars can be considered as no more than evidence of payment. In this state of the record, therefore, there is no plea under which it can be received.

Rule refused (c).

(a) Ante, Vol. 3, p. 784.

(b) Ante, Vol. 4, p. 136.

(c) See *Green v. Marsh*, post.

CHOLMONDELEY, Executrix of HEBER, v. PAYNE and Foss.

If one count in a declaration alleges the defendant to be jointly responsible with another, and a second charges him severally, the Court will order one of the counts to be struck out, if the subject-matter does not appear to be distinct.

BUTT shewed cause against a rule nisi obtained by *F. Robinson*, calling on the plaintiff to shew cause, why one of the special counts in the declaration should not be struck out, pursuant to 5 Reg. Gen.. H. T., 4 Will. 4 (Pleading Rules (a)). The words of that rule were:—

(a) Ante, Vol. 2, p. 314.

“ Counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed ; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.” The first special count of the declaration alleged that the defendants had proposed to the plaintiff that they would undertake to sell a library, they printing catalogues, and settling with the auctioneers employed, at 12½ per cent. commission ; and that they would be responsible, together with the auctioneers, for the proceeds of the sale ; and that the plaintiff accepted the proposal, and employed the defendants for the purpose aforesaid. The count then stated a breach of this contract. The second count alleged, that, in consideration of the plaintiff’s retaining the defendants, upon their request, to sell on commission certain goods of the plaintiff, the defendants undertook to be responsible for the prices of the same ; that they afterwards sold the goods, but had not paid the money resulting from the sale. The declaration also contained a count for money had and received, and on an account stated. The case had already been before a Judge at chambers, when an affidavit was produced, stating that the contract alleged in the second special count was the same as that referred to in the former. The learned Judge, however, had refused to make any order ; and the application was, therefore, renewed before the Court. It was submitted, that the two special counts, as framed in the declaration, did not constitute a breach of the rule of Court. They could not be considered as forming only one contract, since, in the first count, the defendants were alleged to have rendered themselves responsible *with* the auctioneers ; and, in the second, *without* them.

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F. Robinson, in support of the rule, contended, that, as the plaintiff had not produced any affidavit shewing that he proceeded on several contracts, the case was clearly within the rule of Court. If, at the trial, any variance should appear between the contract alleged and the contract proved, the case of *Hanbury v. Ella* (a) was an authority to shew that a Judge at Nisi Prius might direct an amendment to be made. There, the declaration stated that the defendants, in consideration that the plaintiffs would supply one Ella with beer and ale, undertook and promised the plaintiffs to "pay" them the amount of the beer and ale so supplied. The proof was, that the defendants, by letter, undertook to "guarantee" to the plaintiffs the amount supplied. The Court of King's Bench there held, that under the 3 & 4 Will. 4, c. 42, s. 23, the Judge at Nisi Prius might amend the record, by substituting the word "guarantee" for "pay" in that count. If the Court should allow the plaintiff to retain both these counts in his declaration, great prolixity in the pleading would be the consequence, the prevention of which was the object of the new rules of pleading.

PER CURIAM.—The subject-matter of the two counts, as alleged in the declaration, does not appear to be distinct. The declaration, therefore, comes within the meaning of the rule; and, consequently, one of them must be struck out, unless a Judge at chambers shall be of opinion that it may be allowed to remain subject to the conditions contained in 7 Reg. Gen. H. T. 4 Will. 4 (Pleading Rules (b)).

Rule accordingly.

(a) 1 Ad. & Ell. 61; S. C. 3 N. & M. 438.

(b) Ante, Vol. 2, p. 318.

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OVERTON v. SWETTENHAM and Another.

J. JERVIS and **R. V. Richards** shewed cause against a rule obtained by *Stephen*, Serjt., calling on the plaintiff to shew cause why the transcript and proceedings in the County Court of Denbighshire should not be remanded to the sheriff, to be amended according to the facts of the case, if the pleadings therein referred to, or any of them, were delivered or set forth in the Court below at length, or any of the proceedings therein referred to were more fully entered there than appears upon the said return; or, if not, why the said sheriff should not certify to this Court the practice of the County Court in that particular, and shew what forms of pleading are, by the practice of that Court, understood to be expressed by the said entries; and why all proceedings upon the said writ should not in the meantime be stayed. It was an action, in the County Court of Denbighshire, to recover the sum of 1*l.* 10*s.* The plaintiff obtained a verdict; but leave was given to the defendant to move to enter a nonsuit, on the ground of its not appearing that the cause of action had arisen within the jurisdiction of the Court. A writ of false judgment was afterwards brought; and the proceedings appeared from the return to be entered in the under-sheriff's book, in the following form:—

The Court will compel a sheriff to complete his entries of proceedings in a county court, and certify its practice, where, in his return to a writ of false judgment, only minutes of them have been transmitted.

“At the full County Court, &c., before Henry Hert and Peter Pert, Henry Hea and David Fen, four lawful knights of the same county, William Swettenham and Robert Evans Davies complain against Thomas Overton in a plea of debt of 1*l.* 19*s.* 11*d.*

“11th November, 1835. Mr. Edward Jones appears for defendant.

“6th January, 1836. Declaration. Did grant to pay.

‘13th March, 1836. Motion for particulars.

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" 25th May, 1836. Particulars filed.

" 22nd June, 1836. Defendant moved for further time to plead, and a week's time was granted.

" 30th June, 1836. Plea, general issue, filed, with notice of set-off for 2*l.* 2*s.* for work and labour, care, diligence, attendances, and journeys.

" 20th July, 1836. Similiter.

" At the Ninth County Court of the county of Denbigh, holden at Denbigh on the 12th of October, 1836, before &c., cause tried, verdict for plaintiffs, damages 1*l.* 10*s.*, but with permission for defendant to move the court on the 7th December next, for leave to set aside the verdict and enter a nonsuit; or if the sheriff has no legal right to enter such nonsuit, then, that the defendant may move the Court of King's Bench in next term to set aside the verdict and enter a nonsuit.

" At the Eleventh County Court of the county of Denbigh, holden at Denbigh on the 7th of December, 1836, before &c.

" Rule for nonsuit refused.

" 19th Dec. 1836.	Costs taxed at	.	.	£12	9	6
	Damages	.	.	1	10	0
				<hr/>		
				£13	19	6"

The ground on which the rule had been obtained was, that these entries did not constitute a sufficient statement of the proceedings of the Court below. In answer to it, an affidavit was produced, in which it was sworn that the proceedings, as set forth by the under-sheriff in his book, were clearly understood by all attornies and solicitors practising in Wales; and that neither declaration nor plea were ever put on paper, but that the entries of the proceedings were made in the form returned by the sheriff. It was also contended, that the judgment of the Court

below had been sent up by the sheriff, and that this Court had no jurisdiction to send back the record for the purpose of being amended.

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Stephen, Serjt., supported his rule; and cited *Williams v. Lord Bagot (a)*, in which it was determined, that the Court of King's Bench would order an inferior Court to amend the record according to the facts of the case as they occurred below, after an imperfect record had been annexed to a writ of error brought in that Court upon the judgment; and also that a writ of certiorari might issue to the judge of an inferior jurisdiction to return the practice of his Court.

TINDAL, C. J.—The entry in the sheriff's book is only a note of the various kinds of proceeding in the Court below. The object of the present rule is similar to a proceeding on a writ of error; in which case, if all the record is not certified, a diminution of the record may be alleged, and a writ issued to the justices requiring them to certify the whole. Here, however, this being a proceeding on a writ of false judgment, there is no rule to allege diminution; and, therefore, this is only an application that the sheriff may be required to set out the whole record, in order to prevent a failure of justice. The present rule must, therefore, be made absolute.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(a) 4 D. & R. 315.

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WYLLIE and Others v. PHILLIPS.

Where the debt has been paid to the plaintiff's clerk after writ is issued, but before service thereof, and the attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of his writ.

WILDE, Serjt., shewed cause against a rule nisi, obtained by *Kelly*, for rescinding a Judge's order directing proceedings to be stayed without costs in the present action. It appeared that a writ of summons had been issued on the 18th of February in the present year, and, after various attempts, served on the 26th of that month. On the 25th, without the knowledge of the plaintiffs or their attorney, the defendant paid the debt to a clerk of the plaintiff. The attorney, however, proceeded to deliver a declaration; and an order was obtained from a learned Judge at chambers, on the ground that the debt had been paid before the service of the process. It was now shewn by the affidavits that the plaintiffs' attorney was aware of the payment of the debt before declaration: he, therefore, had no right to proceed with the action, after payment to an authorized agent. The order of the learned Judge was, therefore, right for staying proceedings, without payment of costs.

Kelly supported the rule, and contended, that, under the circumstances, the payment to the plaintiffs' clerk could not be considered as a discharge to the action, after the issue of process. The plaintiffs' attorney was, therefore, authorized to proceed in the action for the recovery of his costs.

TINDAL, C. J.—We think that, after the payment of the debt to the plaintiffs' clerk, the attorney, being aware of the fact, ought not to have proceeded to declare. We are therefore of opinion, that the order must be amended, by adding the terms of payment of the costs of the writ. To those costs the plaintiff is entitled.

Rule accordingly.

KING'S BENCH PRACTICE COURT.

Trinity Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

IT IS ORDERED—That from and after the last day of this Term, all the Offices (the Rule Office excepted) be open in Term time from eleven in the forenoon till five in the afternoon, and not in the evening. And that the Rule Office be open in Term time from eleven in the forenoon till three in the afternoon, and from six till eight in the evening.

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And that all the Offices be open in Vacation from eleven in the forenoon till three in the afternoon; except between the tenth day of *August* and the twenty-fourth day of *October*, when they shall be open from eleven in the forenoon till two in the afternoon only.

(Signed) **DENMAN.**
J. LITTLEDALE.
J. PATTESON.
J. WILLIAMS.
J. T. COLERIDGE.

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WHEREAS, by the practice of this Court, Sheriffs may now be required to file Writs with their Returns as well in Vacation as in Term time; and upon all Writs filed in Vacation an extra charge of 5s. 10d. is paid for keys of the Treasury: And whereas the like charge of 5s. 10d. is also paid upon all searches made in Vacation for Writs so filed, and upon all copies of such Writs or Returns thereto:

IT IS ORDERED—That from and after the last day of this present Term, such extra charge of 5s. 10d. be discontinued upon all Writs filed by Sheriffs in Vacation, and all searches for such Writs, and all copies thereof or of Returns thereto; and that hereafter, in Vacation, such Writs may be filed by Sheriffs, and searches made for the same, and copies of such Writs or Returns thereto made and obtained without payment of the said extra charge of 5s. 10d.

(Signed) BY THE COURT.

REX v. HEWITT.

On applying to quash a writ de contumace capiendo, under which a defendant is in custody, it is not necessary to move for a writ of habeas corpus.

J. W. SMITH moved for a rule to shew cause why a writ de contumace capiendo should not be quashed, on the ground of a defect apparent on the face of it. It was directed to the sheriff of Nottingham; and commanded him to take the defendant, although it described the latter as of the county of Kent. The defendant was in custody under the writ, on an office copy of which the application was made; and the only question was, whether it was necessary to move at the same time for a writ of habeas corpus to bring up the body of the defendant, in analogy to the course pursued where a defendant is in custody under a conviction which it is sought to quash.

COLERIDGE, J.—It is not necessary to move for a writ of habeas corpus now. If the writ be bad, the defendant will be entitled to his discharge, as a matter of course. You may have no occasion to sue out a writ of habeas corpus at all.

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Rule granted.

Cause was afterwards shewn by Sir *W. Follett*, before the full Court; and the objection was made, that the only proper mode of proceeding was by habeas corpus. But the Court thought such a writ unnecessary, and the rule was made

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MYLETT v. HUCKER.

MANSEL shewed cause against a rule, obtained by *Dowdeswell*, requiring the plaintiff to give security for costs, on the ground of his having become insolvent; and filed a petition for his discharge under the 7 Geo. 4, c. 57 (the Insolvent Act). It was an action for excessive distress; and the plaintiff, who sued in formâ pauperis, commenced the suit in the Sheriff's Court in London. The defendant removed it into this Court. Subsequently, the plaintiff became insolvent; and, having gone to prison, filed a petition for his discharge, pursuant to the provisions of the Insolvent Act. No assignee had as yet been appointed; but a notice of trial had been given, since the filing of the petition. The defendant then applied to the provisional assignee, as well as the creditors, for the purpose of obtaining security for costs. This had been refused. The present rule was then obtained, with a view to such security. It was submitted by *Mansel*, that the right of action, which the plaintiff now sought to enforce, was not one which passed to the assign-

Where a plaintiff, suing in formâ pauperis, has given notice of trial, and then petitioned for his discharge under the Insolvent Act, and a provisional assignee only has been appointed, the Court will not entertain a motion for security for costs, until he has been dispaupered.

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nees under the assignment provided by s. 11 of the Insolvent Act: consequently, the defendant could have no right to require the plaintiff to give such security.

Dowdeswell, in support of the rule, cited *Doyle v. Anderson* (a), the marginal note of which was—"If an insolvent debtor proceeds with an action after executing his assignment, although no assignees are appointed, the Court will compel him to find security for costs;" and *Heaford v. M'Knight* (b). There, the marginal note was—"Where the plaintiff was discharged under the Insolvent Act, after issue joined and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security for costs." These two cases clearly shewed, that, where the cause of action passed to the assignees under the assignment, and an action was brought in the name of the insolvent, the Court would compel the assignee to give security for costs. The question then was, whether this cause of action did pass to the assignees. The words of the 11th section of the Insolvent Act were as general as those of the Bankrupt Act (6 Geo. 4, c. 16); and it had been held in several cases, that similar actions to the present did pass to the assignees.

COLERIDGE, J.—That does not appear to me to be the real point in this case. The fact of the plaintiff having obtained an order to sue as a pauper, is that on which this case must turn.

Dowdeswell then cited *Mason v. Polhill* (c), the marginal note to which was—"Where the plaintiff becomes bankrupt in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs."

(a) Ante, Vol. 2, p. 596. S. C.

(b) 2 B. & C. 579; 4 D. & R. 81, (c) Ante, Vol. 2, p. 61.

COLERIDGE, J.—It appears to me that the defendant has misconceived his application. The present case is clearly distinguishable from those of *Doyle v. Anderson*, and *Heaford v. M'Knight*; for in these cases the plaintiff was not a pauper. In the present, however, a Judge exercising his discretion under the 23 Hen. 8, c. 15, s. 2, has admitted him to the advantage of pleading in formâ pauperis; by means of which he is relieved from the necessity of paying costs at all. In his present situation, therefore, this application cannot succeed against him. If circumstances have altered, or he has been guilty of misconduct, an application may be made to dispauper him. That must be done, before those, for whose benefit it is stated this action is carried on, can be placed in such a situation as to render the cases cited in support of the rule applicable. The present rule will, consequently, be discharged; but the costs may be made costs in the cause.

Rule discharged accordingly.

Dowdeswell, pursuant to the suggestion of the learned Judge, applied for and obtained a rule nisi for dispaupering the plaintiff; or for leave to plead the plaintiff's insolvency puis darrien continuance, without producing the affidavit required by 3 Reg. Gen. H. T. 4 Will. 4 (Pleading Rules (a)), that the matter pleaded arose within eight days next before the pleading of such plea.

(a) Ante, Vol. 2, p. 313.

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THOMAS v. NOKES.

The clause in statute 9 & 10 Will. 3, c. 25, s. 33, which imposed a penalty of 5*l.* on defendant's neglecting to enter an appearance, has ceased to operate.

J. W. SMITH shewed cause against a rule obtained by *Tyndale*, calling on the defendant to shew cause why judgment should not be awarded against him for a penalty of 5*l.*, pursuant to the 9 & 10 W. 3, c. 25, s. 33, on the ground of his not having entered an appearance to a writ of summons duly served upon him. It appeared, from the affidavit on which the application was founded, that a writ of summons had been sued out by the plaintiff against the defendant, and regularly served on him; that eight days had expired since the service; search had been made at the proper office, and no appearance entered. The words of the 9 & 10 W. 3, c. 25, s. 33, which was entitled "An Act for granting to his Majesty, his heirs and successors, further duties upon stamped vellum, parchment, and paper," were, "for every piece of vellum, parchment, or paper, upon which any common bail should be filed in any court whatsoever, and upon which any appearance that shall be made upon such bail shall be engrossed or written, the sum of sixpence; which appearance or common bail the defendant shall cause to be entered or filed within eight days after the day upon which the process on which the defendant is arrested shall be returnable, upon penalty of 5*l.* to be paid to the plaintiff, for which the court shall immediately award judgment, whereupon the plaintiff may take out execution." Now, going no further than the words of this section, it is evident that they are not applicable to the state of facts in this case. It imposes the penalty, if he does not enter an appearance or common bail, and marks out the time for entering it, which is within eight days after *the return* of the process on which *the arrest* has taken place. Here, however, the defendant was never *arrested* upon the process, because the action was commenced by a writ of summons. Nor

is it possible in this case to reckon from *the return*, as the statute directs, for, the writ was never returned. It is also to be recollected, that it is a penal statute, and consequently to be construed strictly. The Court will not, therefore, if the case do not fall within its very words, be disposed to extend the operation of it, by an unnecessarily liberal construction. But this provision must be considered as repealed by subsequent statutes. The process mentioned in the statute of William the Third, is process returnable on a particular day, on which, the defendant might be arrested, and to which he might enter a common appearance. At the time of passing that statute, there was a particular form of process at common law, on which a defendant might be arrested for the purpose of compelling a common appearance, viz. the *capias* or *latitat*, in cases where the cause of action was not a debt amounting to 10*l*. In the third volume of Mr. Justice *Blackstone's* Commentaries, p. 287, this passage is to be found: "If the sheriff has found the defendant on any of the former writs, the *capias*, *latitat*, &c., he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large." But though a man might be thus arrested for any sum, however trifling, he could not be forced to put in special bail to that process. In *Gilbert's* Common Pleas Practice, p. 35, it is laid down, "that if the defendant be arrested by mesne process, as *capias*, *alias*, or *pluries*, and the plaintiff holdeth him not sufficient to pay the debt or damages contained in the writ, the same amounting to 10*l*. or upwards; in this case the plaintiff, upon the return of the writ, by entering a *ne recipiatur* with the filazer out of whose office the *capias* did issue, may crave special bail to be put in to his action, which the defendant must put in, before some Judge of

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the court where the cause depends, who will accept of such bail as the validity or weight of the cause doth require, or in his discretion shall be thought fit. This rule was taken from the *King's Bench*, where, anciently, if it were under 20*l.*, they let the person out of actual custody upon common bail; but if it were above 20*l.*, they made him find special bail before he could be let loose from the custody of the marshal." So the law existed when the 12 Geo. 1, c. 29, was passed, as its title states, "to prevent frivolous and vexatious arrests." By sect. 1 of that Act it was provided, that "no person shall be held to special bail upon any process issuing out of any superior court, where the cause of action shall not amount to the sum of 10*l.* or upwards." This sum was afterwards increased, by the 51 Geo. 3, c. 124, s. 1, to 15*l.*, and by the 7 & 8 Geo. 4, c. 71, to 20*l.* The power of arrest, therefore, and of holding to special bail, became co-extensive. No mode then existed of arresting on mesne process, where the defendant was not bound to put in special bail, but was to appear by common bail or a common appearance. The statute of the 9 & 10 Will. 3, then became a dead letter, since there was no longer any such process as it contemplated. The authorities on practice, from the time of the 12 Geo. 1, go to shew that the statute of William was repealed. First, there is not a single case in the books in which that Act was called into operation since the passing of the 12 Geo. 1. There were cases previous to its passing, as, for instance, an anonymous case in 5 Mod. 392. That was a case on 5 & 6 W. & M., c. 21, s. 3, the language of which was similar to that of the 9 & 10 Will. 3, and was decided in the ninth year of William the Third. The case of *White v. Holland and another (a)*, was the authority on which the present application was made, and which appeared, by the report, to have been decided in

(a) 2 Stra. 737.

Hilary Term, 13 G. 1. It would apparently, therefore, be a case subsequent to the passing of the Act. By looking, however, at the first section of the Act, it would be found to be provided there, that it was not to come into force until the 24th June, 1726; but Queen Anne having died on the morning of the 1st August, 1714, the reign of George I. commenced on that day, and consequently the twelfth year of his reign ended on the last day in July, 1726. The application, then, in Hilary Term, 1727, in the 13 Geo. 1 (*a*), would most probably have been made in respect of some default in appearing to process issuing before the Act came into force. That case, therefore, could not be considered as an authority, to shew that the Act of William had ever been carried into operation since the passing of the 12 Geo. 1. The usage in all such cases under an Act of Parliament must be considered as evidence of what the law is. That was the opinion expressed by Chief Justice *Tindal*, in the late discussion in the Common Pleas with respect to the Bank charter (*b*). Mr. *Tidd* was evidently of opinion, that the old law was repealed by 12 Geo. 1, c. 29; for in page 240 of his *Practice*, *note c*, he says, "This is the same time as the defendant *was* allowed to file common bail on an arrest *before stat. 12 G. 1, c. 29; and if he did* not file it within that time, he *was* liable to the penalty of 5*l.*, to be paid to the plaintiff. Stat. 9 & 10 W. 3, c. 25, s. 33,"—speaking throughout in the past tense. Again, if the subsequent Stamp Acts be examined, it will be found, that although they increased and re-enacted the amount of the stamp on common bails, they did not re-enact the penalty.

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(*a*) It was on a subsequent day stated to the Court, that the year which the Statute-book denominates 12 Geo. 1, is called in *Raymond's Reports*, with which *Strange's* correspond, 13 Geo. 1;

so that *White v. Holland* was decided, in reality, before the Act came into operation.

(*b*) *Bank of England v. Anderson*, 3 Bing. N. C. 666.

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The 5 W. & M. c. 23, was the first Act which imposed a tax on common bails, and that Act also imposed the penalty now under discussion. The 9 & 10 Will. 3, c. 25, s. 33, repealed the enactments of 5 W. & M. But when the 12 Geo. 1 had passed, and an increased facility was given to the plaintiff's proceedings, by enabling him to enter an appearance for the defendant, the penalty became unnecessary; and, accordingly, no penalty for not entering an appearance by the defendant himself was re-enacted by any subsequent Act. It was, therefore, to be presumed, that the legislature intended to supersede the old mode of compelling an appearance, by enabling the plaintiff to enter one himself. Again, the provisions of the statute of 9 & 10 Will. 3, are inconsistent with those of the Uniformity of Process Act. The first section of that statute has introduced a new species of serviceable process; and section 2 has provided that a new form of appearance should be adopted. Nothing is there said of common appearance or common bail. The entry of an appearance now for the defendant is made under the authority of that act; for by sect. 16 it is provided, "that all such proceedings as are mentioned in any writ, notice, or warning, issued under this Act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be." It is true, that no words are introduced into the statute actually abolishing the former practice, but where the provisions of the Act are inconsistent with the continuance of the former practice, it must be considered as abolished. Thus, in the case of imparlances, there are no words in the Uniformity of Process Act abolishing them; yet it was held, in *Wigley v. Tomlins* (a), and *Nurse v. Geeting* (b), that 2 & 3 Will. 4, c. 39, s. 11, abolished imparlances. So, in the present case, the former practice must be considered as

(a) Ante, Vol. 3, p. 7.

(b) Ante, Vol. 3, p. 157.

impliedly abolished. Again, the 5 Geo. 4, c. 41, must be considered also as having repealed it. In the third schedule attached to that Act, the stamp of 2s. 6d. on an "appearance filed or entered in any action at law wherein no bail shall be filed or put in," is repealed. The object of the enactment in the 9 & 10 Will. 3 being to enforce a fiscal regulation, when that regulation ceased, the law intended to enforce it must be considered as having ceased also. It was clear, that it must be considered as a mere fiscal regulation, and not peculiarly for the benefit of the plaintiff, for whose security it was not necessary, because the sheriff would not have let the defendant out of his custody without having taken security for him, pursuant to the statute of Henry VI., to "keep his day," which meant his appearing in due time to the action. If he did not appear, the plaintiff might have brought his action on the bail-bond, and recovered his whole debt. The plaintiff, therefore, would have his remedy without having recourse to the penalty here provided; and, therefore, it must be considered as having been superadded, for the protection of the revenue. For these reasons, the present rule ought to be discharged, and, as it was a mere experiment, with costs.

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Tyndale, in support of the rule, contended, that none of the authorities or statutes cited on the other side were inconsistent with the provisions of the 9 & 10 Will. 3. The provisions of that statute might subsist, although cumulative remedies might have been given by the 12 Geo. 1. The case of *Sharp and another v. Warren* (a), was analogous. In the marginal note was this passage,—“An Act of Parliament, giving a summary remedy to persons against defaulters, though in terms apparently prescribing such remedy, is cumulative, and does not take away the

(a) 6 Price, 131.

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previous right to sue by action at law." The 12 Geo. 1 only gave the plaintiff the additional advantage of entering at his option an appearance for the defendant, but in no way interfering with his right to enforce an appearance by the defendant himself through the medium of the penalty. It was true that the Uniformity of Process Act had introduced a new form of serviceable process as well as an appearance. The provisions, however, of the 9 & 10 Will. 3 were equally applicable to an appearance under the new act. According, therefore, to the ordinary rule of construction, that if two acts of Parliament were passed on the same subject, the latter ought not to be considered as repealing the former, unless there was contrariety or repugnance between them (a).

Cur. adv. vult.

COLERIDGE, J.—This was a rule calling on the defendant to shew cause why the judgment of the Court should not be given against him, pursuant to the 9 Will. 3, c. 25, in the penalty of 5*l.*, for not having entered an appearance to the writ of summons issued against him. The question on the argument was simply, whether the clause of the statute in question was repealed; it being scarcely denied, that if the clause was still in operation, the case was within it. The clause in question is in these terms, "for every piece of vellum, parchment, or paper, upon which any common bail shall be filed in any Court whatsoever, and upon which, any appearance that shall be made upon such bail shall be engrossed or written, the sum of sixpence; which appearance or common bail the defendant shall cause to be entered or filed within eight days after the day upon which the process on which the defendant is arrested shall be returnable, upon penalty of 5*l.* to be paid to the plaintiff, for which

(a) See Dwarries on Statutes, p. 674.

the Court shall immediately award judgment, whereupon the plaintiff may take out execution." In the ordinary sense of the term, there is no doubt, that this clause has long become obsolete, although found in a stamp act; the penal part of it appears to have been introduced, not for the protection of the revenue, but to aid plaintiffs in enforcing the appearance of defendants at a time when the provisions of the law were very deficient in that respect. It seems accordingly to have been acted upon till the passing of the 12 Geo. 1, c. 29, which empowered the plaintiff, as is well known, upon affidavit of personal service to enter an appearance for the defendant. From that period, or almost immediately after, no case shews that any recourse had been had to it; the provisions of the last-named statute appear to have been considered as a substitute; and when the additional powers are remembered with which plaintiffs are now armed under the Uniformity of Process Act, it would certainly seem very unnecessary to keep alive such an enactment as the one in question. No statute, however, repealing it *in terms* has been mentioned in the learned and laborious argument which was addressed to the Court on shewing cause against the rule; reliance was placed only on the implications of a repeal, which might be made from the 12 Geo. 1, c. 29, and the 2 Will. 4, c. 39. Upon consideration, I cannot say that this mode of reasoning has satisfied me: this penal clause may well stand with the provisions of the later statutes; and when that is the case, I apprehend it is contrary to the rules of legal construction to hold, that a later statute works, by implication, the repeal of a more antient one. But, I think the rule may be discharged upon a safer ground: the penalty attaches upon the neglect to enter the appearance within a certain time after the return-day of the process; the appearance, however, to be so entered is one that has been written upon stamped vellum, parchment, or paper, and so long as the same or any additional

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duty remained imposed on common appearances, it might be contended that there was a subject matter, on which, the clause might operate. By the repeal of stamp duties on legal proceedings, and on appearances among others specified by 5 Geo. 4, c. 41, mentioned in the argument, it has become impossible for the defendant to comply in terms with this enactment. In this way, for want of a subject matter to operate on, I am of opinion, that the clause may be considered as repealed, and consequently that this rule must be discharged.

As this has been an experiment to revive the operation of a statute always somewhat severe, and unnecessary at present to advance the ends of justice, whatever might be the propriety of it when enacted, and which for more than a century has been by common consent abandoned, the plaintiff must be content to pay for it, on failure, by having his rule discharged with costs.

Rule discharged, with costs.

FELTHAM v. KING.

In order to compel a justification of bail, it is sufficient to except to one of them.

ELLIS shewed cause against a rule nisi obtained by *Hoggins* for setting aside the proceedings on the bail-bond in the present case, on the ground of irregularity. It appeared, that when bail was put in, the plaintiff excepted to only one of them, and the defendant treating that exception as a nullity did not justify his bail. The plaintiff then took an assignment of the bail-bond, and commenced an action against the bail to the sheriff. The ground of the present application was, that as the exception by the plaintiff was only to one of the bail, the defendant was not bound to take notice of it, or to justify his bail. The plaintiff, therefore, it was said, was irregular in taking an assignment of the bail-bond, and com-

mencing his action upon it. *Ellis* submitted, that the plaintiff had a right to except to one of the bail only, for that operated as an exception to both, inasmuch as one could not justify alone without consent (a). The object of excepting to the bail was to compel the defendant to appear, and if the exception were such as to render it necessary for him to put in two bail, which were required in order to complete the appearance, it was regular. The defendant, therefore, was bound to justify his bail, and not having done so, the plaintiff was entitled to proceed as he had.

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Hoggins, in support of the rule, contended, that the exception on the part of the plaintiff was inadequate. The form given by Mr. Tidd had reference to two bail, and the practice had always been in conformity with it. Each bail was entitled to say, "I am not satisfied with my co-bail;" and therefore each had a right to know who his co-bail was. The appearance of the defendant in Court was triable by the record, and therefore, it ought to be entered of record. Supposing the exception to one bail to be good, then there would be an entry on the record of only one bail at one time, and then, on the justification of the other, there would be an entry of that fact, instead of an entry of them both at once.

COLERIDGE, J.—The appearance would not be complete, until two bail had justified.

Hoggins.—Suppose time to be given from one term to another, for the time of justification.

COLERIDGE, J.—That cannot appear on the record.

(a) See White's Bail, ante, p. 193.

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Hoggins contended, that the exception to one did in fact say, that the justification was good in part and bad in part. That could not be done, as both bail together only made one appearance.

COLERIDGE, J.—I do not think there is much reliance to be placed on the language of the precedent referred to, on the ground of its being in the plural number. As to the argument, that each bail has a right to know who is his co-bail, I do not attach any weight to it; because either may withdraw and refuse to justify. Then, as to the strict right of the case, the exception to one is the exception to both, because one only cannot justify without the consent of the plaintiff; and if one, therefore, should come up alone, the exception to one would thus operate as an exception to both, as, until both come together, no justification can take place. I think, therefore, that the exception was right. The present rule must consequently be discharged, but without costs.

Rule discharged, without costs.



DOE *d.* MARQUESS WESTMINSTER *v.* SUFFIELD.

The mortgagee of an insolvent cannot, in respect of his interest, oppose an application by the lessor of the plaintiff to issue execution in an ejectment, the plaintiff having been nonsuited for want of confessing lease, entry, and ouster by the insolvent.

HUMFREY shewed cause against a rule nisi obtained by *Cooper*, for allowing the lessor of the plaintiff to sue out execution, on the ground of the defendant not having appeared at the trial, according to the condition of the consent rule. The action was brought to recover the premises in the possession of the defendant for a forfeiture by the non-payment of rent. Subsequently to defendant entering into the consent rule, he became insolvent, and in his schedule in the Insolvent Court he inserted the name of the lessor of the plaintiff, as a claimant on him in respect of the rent. He afterwards obtained his discharge. When

the trial of the cause came on, the plaintiff was nonsuited, for want of confessing lease, entry, and ouster. *Humfrey* appeared on the part of a mortgagee, to whom the defendant had mortgaged the premises in question. If the Marquess of Westminster were allowed to issue execution, he would gain an advantage over the other creditors of the defendant; whereas, he ought to come in, and accept his dividend with the others.

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COLERIDGE, J.—The mortgagee can possess no interest in these premises, as against the Marquess of Westminster. I cannot perceive how the defendant's assignee or his mortgagee can maintain any defence to this action. If they could, they ought to have come in and defended it. The present rule must therefore be made absolute.

Cooper, in support of the rule, was stopped by the Court.

Rule absolute.

—♦—
 BURRELL v. SEATON.

J. JERVIS applied for leave to serve specially a rule nisi calling on an attorney to pay the costs of taxing his bill, the master having taken off more than one-sixth on taxation. After the rule had been obtained, endeavours were used to serve the attorney, but without success. Inquiries were made at his town residence as described in the Master's list, but it was ascertained that he did not reside there. The object of the present application therefore was to be allowed to serve the rule on the attorney's agent.

The court will, under special circumstances, allow a rule, calling on an attorney to pay costs, to be served on his agent.

LITTLEDALE, J.—I think the rule may be served as you desire.

Rule accordingly.

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If, in a country ejectment, the notice is to appear in one term, but the application for judgment is not until the following, it is a matter of course to grant the rule.

DOE *d.* WIGGS *v.* ROE.

OGLE applied for leave to sign judgment against the casual ejector, unless an appearance was entered previous to the conclusion of the present term. The notice at the foot of the declaration required the tenant in possession to appear in Easter Term, and the declaration was duly served before that term. The case of *Doe v. Roe* (a), and *Right d. Jeffery v. Wrong* (b), were authorities in point.

WILLIAMS, J.—As this is a country cause, it was not necessary to make a special application to the Court, for the officers at the rule office would have granted it as a matter of course.

Rule granted.

(a) Ante, Vol. 1, p. 495.

(b) Ante, Vol. 2, p. 348.

LIDDEL *v.* CRANCH.

A plaintiff has four terms from the service of a writ of summons, within which, to enter an appearance for the defendant, if the latter does not appear.

WHATELY shewed cause against a rule nisi obtained by *N. R. Clarke*, calling on the plaintiff to shew cause why the appearance entered by the latter for the former should not be set aside for irregularity with costs. It appeared by the affidavits that the present action had been commenced by a writ of summons, which had been sued out on the 28th February last, and served on the 1st March, both days being in Hilary Vacation. No appearance however was entered until the 29th of May in Trinity Term. It was then entered by the plaintiff, and a declaration delivered on the same day. The ground of the present application was, that the plaintiff had delayed too long in entering the appearance for the defendant, for that

it ought to have been entered in the Easter Term or in the vacation immediately following. Whatever might have been the practice previously to the passing of the Uniformity of Process Act, there was no reason why the plaintiff should be compelled to enter an appearance for the defendant sooner than four terms after the service of the writ. By the old practice in the Exchequer, as decided in the case of *Cook v. Allen* (a), "the plaintiff may enter an appearance for the defendant at any time within twelve months." As to the practice of this Court, the case of *Budgen v. Burr* (b), in which it was decided, that where process was returnable in Easter Term, and the plaintiff did not file common bail, until the following Michaelmas Term, that it was too late, was before the passing of the Uniformity of Process Act.

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N. R. Clarke, in support of the rule, contended, that as no new practice had been settled upon this point, since the act in question had come into force, the case must be decided by analogy to the old practice. By reference to the case of *Budgen v. Burr*, it must be considered, that some limitation should be put to the time within which an appearance might be entered by a defendant. If the plaintiff were to be allowed to delay so long as he had in the present case, there was no limitation to the period during which his delay might extend.

COLERIDGE, J.—By the ancient practice the plaintiff was compelled to enter his appearance within a certain period after the writ had been returned. This is in effect an application to non pros. the plaintiff for not proceeding on his writ. Now, the rule is, that he cannot do that in less than four terms after the service of the process. If the defendant wants to expedite the plaintiff, he should

(a) Ante, Vol. 1, p. 676.

(b) 10 B. & C. 457.

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rule him to proceed. The defendant is served with the writ, and he will not enter an appearance. Why should not the plaintiff be at liberty at any time before the period of four terms has expired to enter an appearance for him? If the defendant will not appear, and I should set aside the appearance entered by the plaintiff for him, he will in fact non pros. the plaintiff before the expiration of four terms. I think, therefore, that the appearance is correct. I do not see why the defendant, who has done nothing himself, should come here and ask to have this appearance set aside. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

CRAIG and Others v. EVANS.

If time to put in bail in a country cause is given by a judge's order, the bail must not only be taken, but the bail-piece transmitted and filed, within the limited time, notwithstanding 1 Reg. Gen. H. T., 2 Will. 4, s. 14.

MARTIN shewed cause against a rule nisi obtained by *Archbold*, for setting aside the proceedings on the bail-bond in this case, on the ground of proceedings having been taken on the bond after bail had been put in within due time. As a preliminary objection, he submitted that the affidavit in support of the application was improperly intitled. It was intitled in the original cause, instead of the action against the bail. This was incorrect, as the real action in which the application was made, and that in which the proceedings were sought to be set aside, was the one brought against the bail.

COLERIDGE, J., (after referring to Mr. Hill, the clerk of the rules).—The affidavit may be intitled in either action. You must proceed to the merits.

Martin.—It appeared from the affidavits that the plaintiff had arrested the defendant on the 26th April, at Caermarthen, and on the 3rd May an order was obtained from *Williams, J.*, for a week's time to put in bail

This period had elapsed on the 10th, and on the 11th the bail-piece was received in London and filed at the Judge's chambers. Notice of that fact was given to the plaintiff's attorney. The time for filing the bail-piece having expired on the 10th, no notice was taken of the defendant's proceeding, and an action was commenced on the bail-bond on the 31st of the month. In so doing, it was contended that the plaintiff was perfectly regular, as the bail had been put in after the time limited by the Judge's order had expired. Reference would perhaps be made to 1 Reg. Gen. H. T. 2 Will. 4, s. 14 (a), the language of which was, "In the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and, in that case, within fifteen days after the taking thereof." This rule however must be considered as repealed by the Uniformity of Process Act, which was passed subsequently to the making of that rule, and introduced the modern writ of *capias*. By that writ, it was commanded "that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him." But, the defendant was bound by the language of the Judge's order to put in bail within the limited period mentioned in it.

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Archbold, in support of the rule, submitted, that from the facts disclosed in the affidavits, it must be taken that the bail had been duly put in. The bail-piece was received in town on the 11th of May from Caermarthen, and therefore must have been *put in* at the latest on the 10th. The Judge's order required that bail should be put in on the 10th, and therefore it had been complied with. With respect to the time of transmission of the bail-piece, as the defendant resided more than forty miles from London, he

(a) Ante, Vol. 1, p. 85.

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was entitled to fifteen days for that purpose, pursuant to the Rule of Court already referred to. Here the plaintiff, if he had chosen, might have excepted to the bail, but he had not done so, and had deferred bringing his action on the bail-bond until the 31st. With regard to the argument that the Rule of Court had been abolished by the Uniformity of Process Act, that argument could not be sustained, because both the act and the rule were consistent with each other, and might be construed together. The Court would therefore not be disposed to hold that rule abolished, unless it was clear that they could not stand together.

COLERIDGE, J.—I am quite clear that the meaning of the Judge's order for time to put in bail is, that within that time the bail should be put in, transmitted, and filed. On that ground, therefore, I think the defendant was irregular, and consequently the plaintiff was authorized to take an assignment of the bail-bond, and commence an action upon it. But in support of the rule Mr. *Archbold* relies on the fact, that in accordance with 1 Reg. Gen. H. T. 2 Will. 4, s. 14, the bail-piece was transmitted and filed within fifteen days from the time of putting in bail. Whether that rule is abolished or not by the Uniformity of Process Act, it is not necessary to decide, but this case is clearly not within it. If it were to be considered as applicable in the way Mr. *Archbold* contends, the defendant would thus have fifteen days to put in bail beyond the time granted him by the Judge's order. The present rule must therefore be discharged, with costs to be paid by the bail, and four days time may be taken to put in bail in the original action.

Rule accordingly.

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DOE *d.* SYMKS *v.* ROE.

SWANN moved for judgment against the casual ejector. The peculiarity in the case was, that the notice was to the tenant to appear "next Easter Term." It was dated "13th May, 1837," and the affidavit of service stated that the deponent had explained to the tenant in possession, that the object of the service was to require him to appear in the next Trinity Term. This, it was submitted, was sufficient to entitle the lessor of the plaintiff to a rule nisi.

Service in ejectment.

COLERIDGE, J.—I think you may take a rule to shew cause.

Rule nisi granted.

STONE's Bail.

DOWLING opposed bail on the ground, that the defendant had taken the benefit of the Insolvent Act, 7 Geo. 4, c. 57, in respect of the debt for which he now sought to put in bail, as well as other debts. It was sworn that he had been remanded by the Insolvent Court for twelve months at the instance of the plaintiff in the present action, as well as other creditors, and that he was now imprisoned under the order of the Court.

Where a defendant seeks to justify bail in respect of a debt for which he has taken the benefit of the Insolvent Act, and been remanded, the Court will not permit the justification.

Chadwick C. Jones, in support of the bail, contended that this was no objection to their justification, as the defendant might be disposed to litigate the justice of the claims, in consequence of which, he was now in confinement. It might happen, as in the present case, that the debt arose out of a guarantee given by him for the debt of another. When he sought the benefit of the act, he might have thought it right to put this debt in his schedule, al-

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though he might have a good defence, if the case were regularly tried. He might perhaps avail himself of the Statute of Frauds.

COLERIDGE, J.—After he has confessed the debt, before the Insolvent Court, and sought to take the benefit of the act in respect of that debt, to what purpose would bail be justified?

Chadwick C. Jones then contended, that as there was no affidavit, shewing the identity in respect of which he now sought to justify bail, and between the debt for which he had taken the benefit of the Insolvent Act, enough had not been done to enable the Court to notice the objection to the justification of bail.

COLERIDGE, J.—The amount of the debt mentioned in the adjudication of the Insolvent Court, and of this, is 25*l*. The parties too are the same. I must consider this case on the same principle as I would direct a jury. Where there is no other debt between the same parties and to the same amount, I cannot speculate on the existence of one. I think the bail cannot justify.

Bail rejected.

Ex Parte REEVE.

The Court will not grant a mandamus commanding the Commissioners of Woods and Forests to pay a poor rate, in respect of lands held by them under the crown.

SIR W. FOLLETT applied for a rule to shew cause why a writ of mandamus should not be issued to his Majesty's Commissioners of Woods and Forests, commanding them to pay a poor rate in respect of certain lands held by them in the county of Surrey, in the parish of Richmond.

COLERIDGE, J.—Either the lands are in the possession

of private individuals or of the king. If they are in the possession of private individuals, then a distress warrant may be obtained against them. If they are in the possession of the king, they are not rateable.

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Sir W. Follett.—Application has been made to the commissioners, but they have declined to pay the rate.

COLBRIDGE, J.—If the lands were held by a tenant under the crown, they would be liable. As that is not so, and the commissioners only hold for the king, under the 10 Geo. 4, c. 50, I think you have no ground to apply.

Rule refused.

GREEN v. MARSH.

GURNEY shewed cause against a rule nisi obtained by *Busby*, calling on the defendant to shew cause, why a verdict should not be entered in favour of the plaintiff to the amount of 2*l*. It was an action of debt, and the declaration contained three counts; first, for materials supplied; second, for work and labour done; third, on an account stated, the sum claimed being twelve guineas in each count, thus making a total of 37*l*. 16*s*. The plaintiff, by his particulars, claimed the sum of 20*l*. 15*s*. The defendant pleaded, first, as to the sum of 10*l*. 3*s*. parcel of the sums mentioned in the declaration, a set-off; secondly, as to a further sum of 8*l*. 3*s*. 6*d*., goods returned; thirdly, as to the residue of the sums stated in the declaration, a payment of 4*l*. 8*s*. 6*d*. into Court. The total amount, therefore, which the defendant undertook to answer was 22*l*. 15*s*. On the first two pleas issue was joined, and the plaintiff in his replication to the third plea accepted the

To a declaration in debt, the defendant pleaded first, as to part, a set-off; secondly, as to further part, goods returned; thirdly, as to the residue, payment into Court. Upon these pleas, he proved sufficient to cover the plaintiff's demand stated in his particulars, but less by 2*l*. than he alleged in his plea of set-off:—Held, that the plaintiff was entitled to a verdict for the 2*l*.

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4*l.* 8*s.* 6*d.* in satisfaction of the residue. The cause was tried before the Judge of the Sheriffs' Court of the City of London, Mr. Serjt. *Arabin*. The defendant proved in support of his first plea a set-off to the amount of 8*l.* 3*s.*; in support of his second plea, that goods to the amount alleged had been returned. Including those sums, and the sum paid into Court under the third plea, the plaintiff's demand was completely covered. It was, however, contended on the part of the plaintiff, that as the defendant had undertaken under his first plea to prove a set-off to the extent of 10*l.* 3*s.*, on which plea, issue was joined, he was bound to prove it to that extent, and, for the deficiency, the plaintiff was entitled to a verdict. The learned Serjeant, before whom the cause was tried, overruled the objection, but gave the plaintiff's counsel leave to move on the point, and the defendant had a general verdict in his favour. The object of the present rule was to enable the plaintiff to enter a verdict in his favour for the amount of 2*l.*, and thus to entitle himself to the general costs of the cause. *Gurney* now submitted, that as the plaintiff's claim was completely covered by the proof given on the part of the defendant at the trial, he was entitled to a verdict in his favour. The plaintiff was bound by his particulars, and could not recover more than he claimed. That sum, the defendant had answered. He cited *Cousins v. Paddon* (a), where it was held, "that a defendant pleading a payment and a set-off, who is unable to prove the full amount mentioned in each of the pleas, but proves sufficient to form an aggregate equal to the plaintiff's demand, will be entitled to have judgment on the whole record." According to that case, the defendant was entitled to have judgment on the whole record, for the deficiency of proof on one plea might be supplied by the excess on another. As to the mode of pleading these

(a) Ante, Vol. 4, p. 488.

pleas, that was in accordance with the directions given by Mr. Baron *Parke*, in the case of *Coates and another v. Stevens* (a), where the learned Baron said the defendant "should have begun by pleading payment of 10*l.*, before action brought, then the set-off, and then the payment of money into Court as to the residue." Under these circumstances, the present rule ought to be discharged.

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Busby, in support of the rule, contended that the plaintiff was clearly entitled to a verdict for 2*l.* The issues lay on the defendant, and if at the trial the defendant had not appeared, the plaintiff would have had a right to a verdict for the 10*l.* 3*s.* and the 8*l.* 3*s.* 6*d.* without producing any evidence, although the plaintiff's particulars claimed a sum short of that amount by the sum of 2*l.* He must, therefore, now be entitled to a verdict for what the defendant did not prove. In the case of *Hurst v. Watkis* (b), it was held, that although the plaintiff, after delivering a particular of his demand, cannot at the trial give evidence himself out of it, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that appears to be due to him. So, in the present case, the defendant admitted on the record, that he was indebted to the plaintiff in the amount of 2*l.* beyond the sum claimed by him in his particulars; and an admission on the record was, at least, of equal effect with parol evidence at the trial. It was consequently incumbent on the defendant to free himself from that liability as much as if the 2*l.* had formed a part of the plaintiff's demand mentioned in his particulars. If he had pleaded *nunquam indebitatus*, then, on the authority of *Cousins v. Paddon*, the sums proved under each plea might be taken together to cover the plaintiff's demand. No such plea, however, was put upon the record, and there-

(a) Ante, Vol. 3, p. 784.

(b) 1 Camp. 68.

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fore *Cousins v. Paddon* was perfectly distinguishable. The money paid into Court could not be used for the purpose of supplying the defect in the defendant's proof on the first plea, for that was specially pleaded to the *residue* only, which must mean the residue after deducting the sums mentioned in the prior pleas. He had, in his first plea, singled out the sum of 10*l.* 3*s.*, part of the plaintiff's demand, and thus rendered it material, and was bound to prove it. In Com. Dig. (Pleader, E. 1) it is laid down, "If the plea does not answer to every part of the declaration, it is a discontinuance for the whole: as in trespass for cutting down three hundred trees, if the defendant pleads, quoad all but the entry and cutting down twenty trees, not guilty, and quoad the entry justifies, but says nothing to the cutting down the twenty trees; this is a discontinuance for the whole." And again, in the same book, (Pleader, E. 27), "If a plea goes only to fact, it must ascertain the part of the declaration to which it is applied." In *Grimwood v. Barrit* (a) it was held, "that in an action on a bond the defendant must set forth in the plea the sum really due on the bond before he is entitled to set off any cross-demand on the 8 Geo. 2, c. 4, s. 5; and such averment is traversable, though laid under a videlicet, the averment being material." So in *Marks v. Lahee* (b), where the plaintiff replied a tender of a large sum, to wit 100*l.*, being a sufficient sum to discharge a lien set up by the defendant; the latter rejoining, that the sum tendered was not sufficient, the Court of Common Pleas held that the amount alleged was the material issue, notwithstanding the videlicet. But in the present case the sum mentioned in the plea of set-off is not laid under a videlicet, and therefore, à fortiori, the defendant is not relieved from the necessity of proving it. It was manifestly material. It is now clearly settled, that if a demand were made in a

(a) 6 T. R. 460.

(b) 3 N. C. 408.

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declaration of a debt of 1,000*l.*, and the defendant proved at the trial the 1,000*l.* to have been paid before action brought, unless he had specifically pleaded payment, the plaintiff would be entitled to a verdict for one shilling, which would carry costs. Upon the whole, therefore, there being no plea of *nunquam indebitatus*, and the defendant having chosen to select this sum of 10*l.* 3*s.*, which on the record he admitted to be due, he was bound to prove the full amount, and, failing to do so, the plaintiff was entitled to a verdict for the sum not proved; and the case did not come within the principle on which the Court, in the case of *Cousins v. Paddon*, had relaxed the ancient strictness with respect to the proof of special pleas. The present rule ought consequently to be made absolute.

Cur. adv. vult.

COLERIDGE, J.—The question in this case was as to the manner in which the verdict was to be entered. It was an action of debt, and the sum mentioned in the declaration was 37*l.* 16*s.*, consisting of three demands, of twelve guineas each. There were three counts in the declaration; first, for materials supplied; secondly, for work and labour done; thirdly, on an account stated. By the particulars, the sum of 20*l.* 15*s.* was claimed. The defendant pleaded, first, as to the sum of 10*l.* 3*s.* a set-off; secondly, as to the sum of 8*l.* 3*s.* 6*d.*, goods returned to that amount; and, thirdly, as to the residue of the sums stated in the declaration, 4*l.* 8*s.* 6*d.* were paid into Court. Issues were taken on the first two pleas. The jury found in favour of the defendant a set-off to the amount of 8*l.* 3*s.*, thus leaving the sum of 2*l.* uncovered. On the issue, as to whether goods to the amount of 8*l.* 3*s.* 6*d.* had been returned, the jury found that they had been returned. In the third plea, which was to the residue of the plaintiff's demand, the defendant, in the usual form given by 17 Reg. Gen.

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H. T. 4 Will. 4, (Pleading Rules) (a), said, "that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of 4*l.* 8*s.* 6*d.* ready to be paid to the plaintiff; and the defendant further says, that he is not indebted to the plaintiff to a greater amount than the said sum, in respect of the said residue of the cause of action in the declaration mentioned." The plaintiff, in his replication, says, "that he accepts the sum of 4*l.* 8*s.* 6*d.* so paid into Court, in full satisfaction and discharge of the said residue of the cause of action, and that he will not further prosecute his action in respect thereof." The particulars only claiming the sum of 20*l.* 15*s.*, the defendant pleaded to the sum of 22*l.* 15*s.*, and proved a set-off to the extent of 20*l.* 15*s.*; so that, in point of fact, he proved a liquidation of every farthing which the plaintiff claimed. But he left 2*l.* unproved, which, by his plea of set-off, he admitted to be due. For that sum, Mr. Busby contended, that the verdict ought to be entered in favour of the plaintiff, and that he was entitled to the general judgment, and general costs of the action. The question is, how ought the verdict to be entered? The case referred to is that of *Cousins v. Paddon*, where this question was considered very fully by the Court of Exchequer. That was an action of debt for goods sold and delivered, work and labour, and on an account stated. The defendant pleaded, first, *nunquam indebitatus*; secondly, as to 338*l.*, parcel of the said sum demanded, payment of that sum; thirdly, as to the sum of 500*l.*, parcel of the sum demanded, a set-off to that amount. At the trial, the defendant only proved payments to the extent of 314*l.* 3*s.*, and a set-off, to the amount of 21*l.* The jury were of opinion, that the sums proved by the defendant under his two pleas, were together a sufficient price for the goods delivered. The case decided, first, that the defendant

(a) Ante, Vol. 2, p. 320.

could not, upon the pleas, have the verdict entered entirely for himself, because, although the sums were laid under a videlicet, they were material, and the defendant ought to prove them. I think it will follow from that case, that if only those pleas had been on the record, the judgment would have been in favour of the plaintiff, for the difference between the sum alleged and the sum proved. But, in that case, the plea of *nunquam indebitatus* as to the whole sum was on the record. The Court there said, "The verdict must be entered on the plea of payment, so far as relates to the sum of 314*l.* 3*s.*, for the defendant; on the plea of set-off, so far as relates to the sum of 21*l.*, for the defendant; and on the plea of *nunquam indebitatus* as to the whole sum demanded, except 335*l.* 3*s.*, for the defendant. The consequence will be, that on the whole record the defendant will have judgment." There, however, the Court, in entering up judgment, took notice, that the difference between the sums alleged in the pleas and proved was covered by another plea. No such other plea, however, exists in this case. We are therefore to see, whether there is anything equivalent to it on the record. The sum of 10*l.* 3*s.* must be taken as an admitted demand, on the face of the plea. It is contended, that we may transfer the excess of proof on one plea, in order to supply what is deficient on the other; that is to say, that we may apply a portion of the money paid into Court under the third plea, in order to supply the defect of proof on the plea of set-off. But I think that that cannot be done in this case. Then, with regard to the sum paid into Court. The plea of payment must be considered independently of the two pleas as to the sums of 10*l.* 3*s.* and 8*l.* 3*s.* 6*d.* This is not a plea in bar of the action, but that the defendant is not indebted to the plaintiff in a greater amount than 4*l.* 8*s.* 6*d.*, in respect of the residue of the cause of action, in the said declaration mentioned. He does not say that he never was

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indebted, and consequently there is no issue as to the existence of the debt originally, but is a plea of something which might have arisen after the action was brought. The replication, in which the plaintiff accepts the 4*l.* 8*s.* 6*d.*, in respect of the cause of action as to which it was paid in, only refers to the residue of the claim made by the plaintiff. At first, I was disposed to consider the replication in the nature of a *nolle prosequi*; but I do not think it can be so considered. The residue is, therefore, to be regarded as exclusive of these two pounds. I cannot see, therefore, since they are part of a material allegation which has not been proved, how I can direct judgment to be entered up for the defendant. Undoubtedly cases must be decided *secundum probata*, but they must also be decided *secundum allegata et probata*. With great regret therefore on my part, as it is not according to the justice of the case, the verdict must be entered in favour of the plaintiff for the sum of 2*l.*, which will entitle him to the general judgment, and the general costs of the cause.

Rule absolute.

TOPHAM *v.* KIDMORE.

To a declaration for goods sold and delivered, the defendant pleaded, first, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.*, part of the last-mentioned sum, payment before action brought; as to 18*l.*, further parcel of

the said sum, payment into Court of that amount; as to the residue, a set-off. The plaintiff replied, accepting the 18*l.* in satisfaction, &c., taking no notice of the other pleas. The Court gave leave to the defendant to sign a judgment of non pros., unless the plaintiff amended his replication on payment of costs, or consented to taxation of costs as upon a *nol. pros.* in respect of the unanswered pleas.

R. V. RICHARDS shewed cause against a rule nisi obtained by *N. R. Clarke* requiring the plaintiff to shew cause why the plaintiff should not reply to the first, second, and fourth pleas of the defendant, or why in default thereof the defendant should not be at liberty to sign a partial judgment of non pros., limited to so much of the cause of action as was not covered by the third plea, or why the plaintiff should not enter a *nolle prosequi*

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as to those pleas. It was an action of assumpsit, and the declaration contained a count for goods sold and delivered, work and labour done, money lent, and on the account stated. The particulars demanded the sum of 240*l.* 18*s.* 7*d.* The defendant pleaded first to the whole declaration except as to the sum of 65*l.* 1*s.* 6*d.*, non assumpsit; secondly, as to 17*l.* 18*s.* 2*d.*, payment; thirdly, as to the sum of 18*l.*, payment into Court; fourthly, as to the residue, a set-off. The plaintiff replied, taking the 18*l.* out of Court, "in full satisfaction and discharge of the causes of action in the said declaration mentioned, and therefore as to those causes of action the plaintiff saith that he is satisfied, and because the said defendant hath confessed the said causes of action, the plaintiff prays judgment for his costs and charges by him about his suit in that behalf expended to be adjudged to him." As to the first, second, and fourth pleas, the plaintiff did not reply, but gave notice of taxation pursuant to 19 Reg. Gen. H. T. 4 W. 4, (a) (pleading rules). Before the master it was contended, that the plaintiff in the present state of the record was not entitled to his costs. The present rule had, therefore, been obtained. *R. V. Richards* submitted that the case of *Coates and another v. Stevens* (b), had decided the present. The marginal note of that case was, "Where a defendant pleads payment of money into Court generally upon the whole declaration, and then pleads other pleas as to all except as to money paid in, and the plaintiff takes out the money paid in, and taxes his costs under rule 19 H. T. 4 W. 4, in full satisfaction, the cause is at an end, and the defendant has no right to the costs of the subsequent pleas, nor can he sign judgment of non. pros., for want of a replication to them." The only distinction between that case and the present was, that the defendant there signed judgment of non. pros., and the Court set it aside. Here,

(a) Ante, Vol. 2, p. 321.

(b) Ante, Vol. 3, p. 784.

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the defendant was applying for leave to sign such a judgment.

N. R. Clarke, in support of the rule, contended that the case of *Coates v. Stevens* was clearly distinguishable from this. There, the defendant had paid the money into Court generally on the whole declaration; whereas here, the defendant had only paid it in as to a portion of the plaintiff's claim. In *Coates v. Stevens* Mr. Baron *Parke* said, "The proper mode of pleading these pleas would have been this:—you should have begun by pleading payment of 10*l.* before the action brought, then the set-off, and then the payment of money into Court as to the residue. All the defences should be first exhausted, and then the plea of payment into Court should be to the residue only; instead of which, the defendant has paid money into Court on the whole declaration. The rule must therefore be absolute." In the present case, the 18*l.* had not been paid into Court on the whole declaration, and, therefore, was free from the objection of Mr. Baron *Parke*, which formed the reason of his setting aside the judgment of non. pros. in *Coates v. Stevens*. A similar direction as to the order in which the pleas should be pleaded was given in the case of *Sharman v. Stevenson* (a). The case of *Goodee v. Goldsmith* (b), which was subsequent to the before-cited cases, was a direct authority in support of the present application. The marginal note of that case was, "To counts for money had and received, and on account stated, the defendant pleaded non assumpsit, except as to 3*l.* 5*s.*; set-off, except as to 3*l.* 5*s.*; and payment of 3*l.* 5*s.* into Court. The plaintiff admitted the set-off, took the money out of Court, and declined further to prosecute his action:—Held, that the defendant was entitled to the costs of the two first issues." There Mr. Baron *Parke*

(a) Ante, Vol. 3, p. 709.

(b) Ante, p. 288.

said, "The plaintiff is entitled to all the costs of that part, upon which money is paid into Court, and the defendant to the costs on the other issues. The replication amounts, in effect, to a nolle prosequi. The plaintiff has abandoned his cause of action upon the general issue and the set-off. The Act of Parliament (3 & 4 Will. 4, c. 42, s. 33) is in such cases imperative. Here, the plaintiff had abandoned his cause of action on the general issue, on the plea of payment before action brought, and on the plea of set-off. He had, therefore, in effect, entered a nolle prosequi on those issues. The pleas adopted by the defendant, he had been compelled to put on the record, in answer to the plaintiff's claim.

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Cur. adv. vult.

WILLIAMS, J.—This was an application respecting costs, and the rule called on the plaintiff to shew cause why he should not reply to the first, second, and last pleas of the defendant; and if not, why the defendant should not be at liberty to enter a partial judgment of non pros., or why the plaintiff should not enter a nolle prosequi as to the first, second, and last pleas. The declaration was in assumpsit for goods sold and delivered, work and labour, and the money counts. The particulars of demand claimed 240*l.* The pleas were, first, as to all the declaration except the sum of 65*l.* 1*s.* 6*d.*, non assumpsit; 2ndly, as to the sum of 27*l.* 18*s.* 2*d.*, payment before action brought; 3rdly, as to the sum of 18*l.*, parcel of the sum of 65*l.* 1*s.* 6*d.* in the first plea mentioned, payment into Court; and 4thly, as to all except the 18*l.*, a set-off for money paid, and on an account stated. The plaintiff then took the 18*l.* out of Court, and took no notice of the first, second, and last pleas; and the question was, whether that course was open to him? It is right to observe, that these

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pleas were pleaded in the manner noticed, if not recommended, by the Court of Exchequer in the case of *Coates v. Stevens*; and the question, as I have already stated, is, if it is open to the plaintiff to adopt this course of taking the money out of Court without noticing the other pleas? It is necessary to observe the consequence of what the defendant has pleaded, and of the claim made by the plaintiff. The first plea leaves the sum of 65*l.* 1*s.* 6*d.* unanswered; the second only answers a portion of the demand; and the third pays into Court a less sum than that not covered by the first plea. Now, therefore, it is clear that from the demand of the plaintiff to the extent he made, the defendant could not have relied on the payment into Court, as that was not a satisfaction for 65*l.* 1*s.* 6*d.* The plaintiff, therefore, by the amount of his demand, made it indispensable for the defendant to do more than pay the sum of 18*l.* into Court.

Hence the first, second, and last pleas were all introduced from the necessity of the case, and from the plaintiff's demand being more than the defendant thought right to pay into Court. On this single ground, therefore, the plaintiff is not at liberty to pass over all those pleas without taking any notice of them. A rule must be made, that if the plaintiff will consent, the Master shall tax the costs as if a *nolle prosequi* had been entered to the first, second, and last pleas, or else that he should be at liberty to amend his replication on payment of costs; if he will not consent, then that the defendant may sign judgment of non pros. for want of a sufficient replication.

Rule accordingly.

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COWLING applied (5th June) on the behalf of an articulated clerk, for leave to send in his answers to the questions propounded by the examiners pursuant to the Rules of Easter Term, 6 Will. 4 (a). It was required that those answers should be sent in to the secretary of the Incorporated Law Society between the 23rd and 30th May inclusive. The agent who had been intrusted to send down a copy of these questions to the articulated clerk had by inadvertence omitted to send them, until after the 30th May. Consequently, it was impossible for the clerk to send in his answers within the period prescribed by the examiners. The day for examination, however, had not arrived, but the answers had been sent up. The object of the present application therefore was, that the answers so transmitted might be now sent in. No injury or inconvenience could result from acceding to the application. It was also to be observed, that the rule requiring the answers to be transmitted within the limited time was not a rule of court, but a direction made by the examiners themselves.

Where a clerk has omitted to send in his answers to the questions, pursuant to Reg. Gen. E. T. 6 W. 4, within the time limited by the examiners, in consequence of his agent omitting to transmit them in sufficient time, the Court allowed him to send in the answers subsequently, the agent paying the costs of the application.

Mere ignorance of the rules as to the admission of attorneys will no longer be an excuse for non-compliance with them.

COLERIDGE, J.—It ought to be understood that the Judges will not deal lightly with the rules laid down by the examiners. As a matter of necessity, they must limit some period, within which, the requisite preliminaries to examination shall be fulfilled. These rules have now been so long in force, that there is no excuse for ignorance of them. It is now determined that mere ignorance of the rules shall henceforth be no ground for disobedience to them. In this particular instance, however, as the non-compliance with the rule does not appear to have arisen from the alleged ignorance of the clerk, but from

(a) Ante, p. 4.

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the negligence of the agent, the present application may be granted, on condition of the London agent undertaking to pay the costs of this application.

Rule granted accordingly.

REYNOLDS v. ASKEW.

An application to set aside an award made under 9 & 10 W. 3, c. 15, must be made before the last day of the next term after the publication of the award, and if the submission is not made a rule of Court until a subsequent term, it is too late to disturb the award.

In order to set aside an award at common law, very strong reasons must be shewn for not applying within the first four days of the term next after the making the award.

CROWDER and *Barstow* shewed cause against a rule nisi for setting aside an award, and contended that the application was too late. The rule was obtained in Easter Term.

Erle and *Moody* supported the rule.

Cur. adv. vult.

COLERIDGE, J.—I am of opinion that this application was made too late, and it is therefore unnecessary for me to go into the merits of the case. It appears that there was an action pending between the parties, but in what state, it does not exactly appear. The parties, however, went down to trial. The cause was not entered for trial, but the articles of agreement were executed, by which the matter was referred to arbitration. That was in the summer of 1836: the award was made on the 11th of the following August. It does not appear, whether notice of the award was then given, but it does appear, that in December the party who is now seeking to set aside the award was aware of its having been made and published; he was also aware it was made against himself. There is no doubt, therefore, that at that time the award was made and published to both parties. It is said that there was some hesitation in giving a copy, but it must be taken that it was sent by the beginning of January last, as in the defendant's letter, dated on the 3rd of January, it is stated that steps would be taken to set the award aside. Now, the first

question is, whether this is an award under the statute of 9 & 10 Will. 3, or at common law. As far as I have at present referred to the facts, this Court had not interfered at all; and if this rule had been granted in Hilary Term, how would the case have stood? Would the application have been made under the statute, or to the jurisdiction of the Court by the common law? There had been nothing but the agreement of the parties to refer the matter to arbitration; how could it be said that the Court then had any jurisdiction over the matter at common law. In February, it is said, that information is first obtained which shewed that there were grounds for setting aside the award: the parties then went before a judge, and all proceedings were stayed until the fifth day of Easter Term. It is then first that this Court has jurisdiction,—then it is that the submission was made a rule of Court. I think clearly, therefore, that this is an application made under the statute. It is said, that this Court has authority at common law over such matters, and there is no doubt that it has; but then in this case the parties have not put themselves in a situation to ask for the authority of the Court, this award not having been made under any order of the Court to refer the cause that was pending between the parties. The words of the 9 & 10 Will. 3, c. 15, s. 2, are express, “That any arbitration or umpirage procured by corruption or undue means &c., shall be set aside &c., so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties.” Now; has that condition been performed in this case? I say it has not. Reference has been made to the case of *Perring v. Keymer* (a). In that case it was never contended that the party was set free from the condition of the statute,

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(a) Ante, Vol. 3, p. 98.

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but that further time should be allowed to move to set the award aside; and *Williams, J.*, said, that the motion might be made the following term, and that if a rule nisi was granted it should be dated as of that term. He thereby admitted the force of the statute, but with some astuteness, I think, brought the case within its provisions. That case, therefore, is an authority in favour of the decision I have now come to. But, supposing the argument of Mr. *Moody* were correct, that the Court has jurisdiction by the common law in this case, it is then a matter for the discretion of the Court: under the exercise of that discretion I think this case cannot now be heard, and for this reason; a person who would make out a case to take himself out of the ordinary rule, that applications to set aside awards, not under the statute, must be made within the time allowed for moving for a new trial, should shew *clearly* to the Court the reason why the application is made so late. That has been left in uncertainty in the present case: he has not shewn when first he got the copy of the award, nor has he shewn sufficiently, that he did not know of the grounds, on which, he seeks to set aside the award, until the month of February. Either way, therefore, this application is too late, and the rule must be discharged with costs.

Rule discharged with costs.

LOWDER v. LANDER.

An attorney, resident in London, has only four days time for pleading in a country cause, notwithstanding the Uniformity of Process Act, (2 W. 4, c. 39).

DAVISON obtained a rule to shew cause why the judgment signed in this case for want of a plea should not be set aside, with costs, for irregularity. A declaration, of which the venue was laid in Surrey, had been indorsed to plead in four days, and judgment was signed on the fifth day.

R. V. Richards shewed cause upon an affidavit, stating the defendant to be a practising attorney resident in London. The case of an attorney was an exception to the general rule : he has no more time allowed for pleading in a country cause than in a town one : *Mann v. Fletcher* (a), *Archbold's Practice*, by *Chitty* (b).

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Davison, contra. — Without impugning the propriety of that decision, it is submitted that it is clearly inapplicable, since the Uniformity of Process Act, (2 Will. 4, c. 39). The only reason given for the judgment in the case cited is, that an attorney is supposed by fiction of law to be always present in Court. That fiction may formerly have existed to some practical purpose, when an attorney was sued by bill, and no process was requisite to bring him into Court. Since the above act, however, he is sued by writ of summons, and is actually required, in like manner with any ordinary defendant, to enter an appearance. The fiction itself having been abolished, the practice founded upon it should be discontinued, especially as it may produce inconvenience to professional defendants living in remote parts of the country.

COLERIDGE, J. (after conferring with the Master *Bunce*). — Where a defendant is an attorney, and resides in London, he has only four days for pleading even in a country cause. The Uniformity of Process Act does not appear to me to affect the practice in this particular; and as this rule was moved with costs, it must be discharged with costs.

Rule discharged, with costs (c).

(a) 5 T.R. 369.

(b) 3rd ed. p. 194.

(c) See *Brenton v. Lawrence*, ante, p. 506.

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KING v. MYERS.

If a plaintiff by his indorsement on the writ claims an amount recoverable in a Court of Requests, the Court will not on payment of that sum, relieve the defendant from costs before trial, but will leave him to apply to enter a suggestion.

Judgment signed on the 23rd; summons to set aside on the 25th; dismissed on the 26th; application to Court not too late on 29th.

The decision of a judge at chambers may be reviewed by a single judge sitting in the Bail Court.

A plea of never did *promise* is a nullity in an action of *debt*.

PAYNE applied for a rule to shew cause why the interlocutory judgment signed in this case should not be set aside for irregularity, and why, on the payment of 2*l.* 18*s.*, the defendant should not be discharged from paying any costs. It was an action of debt, and the writ of summons was indorsed with the claim of 2*l.* 18*s.* for debt, and 1*l.* 10*s.* for costs. The defendant pleaded that he never promised, and the plaintiff, treating it as a nullity, signed judgment as for want of a plea. It was submitted, on the first point, that the plaintiff had no right to treat the plea as a nullity; and as to the second, that as the amount claimed on the back of the process was of an amount recoverable in the London Court of Requests, and it was sworn that the cause of action had arisen within the jurisdiction of that court, the defendant ought to be discharged from all costs in the superior court on payment of the sum so claimed on the back of the writ. If the cause proceeded, and the plaintiff recovered the whole amount which he claimed, the defendant, by an application to the Court, might free himself from all costs. If, therefore, the present application were granted, any increase of expense or litigation to the parties would be prevented.

WILLIAMS, J.—As to the latter part of the application, I cannot grant the rule in the present state of the proceedings, for that must be the subject of a suggestion under the Court of Requests' Act, to which reference has been made. You may, however, take your rule as to the former part.

Rule granted.

Heaton shewed cause.—He submitted, in the first instance, that the defendant was out of time in applying for

the present rule. The judgment was signed on the 23rd May; on the 25th the defendant took out a summons to set aside the judgment, which was dismissed on the 26th; then on the 29th the present rule was obtained.

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COLERIDGE, J.—I think that, as the defendant took out a summons on the 25th, the judgment having been signed on the 23rd, and which was not dismissed until the 26th, he was sufficiently early in applying on the 29th.

Heaton then contended, that the matter had been disposed of by a Judge at chambers, and, therefore, it was not competent for a Judge sitting in the Bail Court to reverse the decision of a Judge at chambers.

COLERIDGE, J.—It is the continual practice of this Court to entertain such motions.

Heaton then contended, that the plea of non assumpsit in an action of debt was a nullity, and that the plaintiff was entitled so to treat it. In *Stafford v. Little (a)*, it was held, that in an action of assumpsit the plea of nil debet was a nullity, and in *Perry v. Fisher (b)*, recognizing *Lockhart v. Mackreth (c)*, it was held that such a plea as the present was a nullity in an action of debt. In *Brennan v. Egan (d)* the Court of Common Pleas held, that the plea of non assumpsit to a declaration in debt may be treated as a nullity.

Payne, in support of the rule, contended, that as all the cases cited had occurred previous to the introduction of the new rules of pleading, they could not be considered as authorities against the present application. The proper course for the plaintiff to have adopted would have been to

(a) Barnes, 257.

(b) 6 East, 549.

(c) 5 T. R. 661.

(d) 4 Taunt. 164.

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demur to the plea, or to apply to set it aside. Since the introduction of the new rules, this plea must be considered as only an informal mode of pleading "never was indebted." He cited *Aaron v. Chaundy* (a). That was an action of assumpsit on a promissory note. The defendant pleaded non assumpsit, and having made up the issue, ruled the plaintiff to enter it, and he by mistake entered a plea of not guilty. The defendant signed judgment of non pros.; but the Court of King's Bench held, that the plea entered was substantially the same as the other, and the judgment was set aside.

COLERIDGE, J.—That case is distinguishable from the present, because the defendant, when he pleads non assumpsit in an action of debt, denies having promised, when no promise is charged in the declaration. With respect to what passes at chambers, of course an opinion of a learned Judge there would have great weight with a Judge sitting in this Court; but the Judges would be extremely sorry, if anything which passed there should not be freely reviewed in this Court. Nothing can be more clearly distinguishable than the case of *Aaron v. Chaundy* from the present. There, the defendant pleaded the proper plea in an action of assumpsit on a promissory note. The plaintiff made a mistake, and entered not guilty instead of non assumpsit; upon which the defendant signed a non pros., and the Court then set aside the judgment; but then, the plea pleaded was the proper one, although the plea entered was informal. There are certain instances in which the plea of not guilty in an action of assumpsit, which is an action on the case, raises the question in an informal manner. That was the observation of the Court in that case. But the distinction between assumpsit and debt is well ascertained. The present rule must be discharged.

Rule discharged.

(a) 2 B. & C. 562.

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Ex parte CRIPWELL.

CRESSWELL shewed cause against a rule nisi obtained by *Hoggins*, calling on an attorney of the Court to shew cause why he should not pay over a balance of 200*l.* remaining in his hands to the applicant, and deliver up all deeds and papers belonging to the said applicant. The affidavit on which the rule had been obtained, stated that the attorney in question had been employed by the applicant to prepare certain deeds of mortgage, in order to raise two several sums of 300*l.* and 1500*l.* The deeds were accordingly prepared, and the two sums paid over by the mortgagee into the hands of the attorney. Various claims had been satisfied by the attorney at the instance of the applicant, and a balance was now left in his hands of about 200*l.* This sum he had refused to pay over, or to deliver any bill of costs. *Cresswell* submitted, that this was not a case in which the Court would exercise its summary jurisdiction in order to compel the payment of this money to the applicant. The doctrine of *In re Attkin* (a), as to the exercise of the Court's summary jurisdiction over attornies, had been considered as going to the extreme verge of the law. In many cases since that, the Court had doubted whether that case had not proceeded too far. In the case of *Ex parte Schwalbanker* (b), the Court under similar circumstances to the present refused to interfere. The marginal note to that case was, "Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the Court will not compel him summarily to pay over the alleged balance." *In the matter of Charles Bonner* (c), the marginal note was, "Where an attorney, employed by

Where an attorney has been employed to prepare mortgage deeds, and he receives the money raised by the mortgage, he may be called upon summarily to account for it.

(a) 4 B. & Ald. 47.

(b) Ante, Vol. 1, p. 182.

(c) 1 N. & M. 555.

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both vendor and purchaser, received the purchase money and omits to pay it over, and afterwards becomes a bankrupt, and obtains his certificate, the Court will not make a rule compelling him to pay the amount, unless fraud be shewn: otherwise, if there be fraud." The case of *In re Murray* (a) was distinguishable from the one now before the Court, for the application there made was principally to deliver up deeds. Here, however, it was not shewn by the affidavits that there were either deeds or papers in the attorney's possession. The applicant in the present case had no other object in view than obtaining a debtor and creditor account, but which under the circumstances he had no right to demand.

Hoggins, in support of the rule, referred to the case of *In re Aitkin*. The judgment of *Abbott*, C. J., was peculiarly applicable here. His lordship said, "The question in this case is, whether this Court will compel an attorney to do that which in justice he ought to do. Now the rule by which the Court are to be governed in exercising this summary jurisdiction over its officers, seems to me to be this: where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way, to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to form a presumption, that his character formed the ground of his employment by the client, there, the Court will exercise this jurisdiction. And the case where the Court compelled the attorney to deliver over deeds placed in his hands for the purpose of making a conveyance, proceeds upon this ground. For inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party, in respect of being an attorney." That was a direct

(a) 1 Russell, 519.

authority in the present case. In *Ex parte Schwalbanker*, the judgment of Mr. Justice *Patteson* admitted the rule by which the Court governed its decisions in cases like the present, although the particular circumstances there did not appear to his Lordship to authorize the summary interference of the Court. In *re Woolfe and others v. ——— (a)*, the Court held that a summary application may be supported against an attorney to compel him to pay monies received by him, though he was not employed in any suit. In *re Murray*, already referred to, was an authority also in support of the present application.

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COLERIDGE, J.—I think the present rule ought to be made absolute. I never heard the case of *In re Aitkin* was not good law. It has been the authority for many decisions. The question is, whether the attorney was employed in consequence of his being an attorney. If he was so employed on account of that special character, as he is an officer of the Court, he may be made amenable for his conduct as such officer. I think that he received this money in consequence of his being an attorney. The preparation of the deeds was confided to him because he was an attorney, and he received the money because he prepared the deeds. The present rule must, therefore, be made absolute.

Rule absolute.

2 Chit. Rep. 68.

THOMPSON v. VAUX and Another.

PETERSDORFF shewed cause against a rule nisi obtained by *Dowling*, requiring the plaintiff to shew cause why the warrant of attorney on the judgment and execution, under which the defendant was in custody, should not

In an application for the delivery up of a warrant of attorney, the affidavits may be intitled in a cause.

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be delivered up to the defendant, on the ground of its having been put in suit contrary to good faith. As a preliminary objection, *Petersdorff* submitted, that the affidavit in support of the application was improperly intitled. It was intitled in a cause, whereas no cause was in fact depending. The warrant of attorney could only be considered as a power to the plaintiff to enter up judgment, which did not constitute a cause in Court.

Dowling, in support of the rule, contended, that the fact of a judgment being signed, shewed that there must be a cause in which the judgment was signed. Accepting such a warrant was an admission on the part of the plaintiff, that there was a cause. In *Manley v. The Marquis of Blandford*, a manuscript case, mentioned in a note to *Sowerby v. Woodroff* (a), the Court observed, that the warrant of attorney constitutes a cause in Court when used. In *Sowerby v. Woodroff*, it was decided that, in entering up judgment on an old warrant of attorney, the affidavit may be properly intitled in a cause.

WILLIAMS, J.—(after consulting Mr. Hill, the clerk of the rules). I think the affidavit is properly intitled.

The rule was afterwards made absolute on the merits.

Rule absolute (b).

(a) 1 B. & Ald. 568.

(b) See *Perrin v. West*, 5 N. & M., where it was held, that a defendant, being in custody under civil process out of an inferior court, is brought up by habeas corpus,

and committed to the custody of the marshal, affidavits filed in the Court of K. B. to ground an application to be discharged out of custody, may be intitled in the cause.

1837.

KENDRICK *v.* DAVIES.

CRESSWELL shewed cause against a rule nisi, obtained by Sir *W. Follett*, calling on the plaintiff to shew cause why the award in this case should not be set aside, on the ground of the arbitrator having exceeded his authority in fixing the amount of costs to be paid by the defendant; and in directing the payment of that and another sum, as a condition precedent to the award of mutual releases.

Sir *W. Follett* shewed cause.

Cur. adv. vult.

COLERIDGE, J.—This was an application to set aside an award, on the following grounds, appearing on the face of the award. The instrument recited the existence of disputes concerning a debt of 40*l.*, claimed by Kendrick from Davies, and a debt claimed by Davies from Kendrick, and that an action had been commenced for the recovery of the former sum; that for the ending all such disputes, and settling the amount of such demands, a reference of them had been agreed on; that the arbitrator was to be at liberty to set off one debt against the other, so as to ascertain the real balance; and that all costs and charges already incurred in prosecuting or defending the said suit, and of the award and reference, should be paid by the party against whom the decision should be. The arbitrator then found, that at the time of commencing the action, and making the reference, there was, and is, due from the defendant to the plaintiff 19*l.* 0*s.* 1*d.*, and awarded payment of that sum by the defendant, and acceptance of it by the plaintiff, in full satisfaction and discharge of all claims of the plaintiff to the time of commencing the action. He further awarded, that the defendant should pay to the plaintiff the sum of 32*l.* 15*s.* 2*d.*, being the costs already

If, by the submission, the costs of an arbitration are to abide the event, it is an excess of jurisdiction for the arbitrator to determine their amount.

If an arbitrator directs mutual releases on payment of a sum of money, over which he has jurisdiction, as well as of a sum over which he has none, the award is good as to the former.

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incurred by the plaintiff in prosecuting the suit, and the costs of, and occasioned to her by the reference; and that he should pay to himself, the arbitrator, the sum of 10*l.* 5*s.* 2*d.*, being the costs of the award. And he further awarded, that after payment of the said sums of money, each party should execute, if required, to the other, a release of and concerning all the matters so referred.

It was objected, that the arbitrator had exceeded his authority in fixing the amount of the costs, and in making the payment of the sums so paid a condition precedent to the execution of a release.

The provision in the submission as to the costs is, in substance, that they shall abide the event of the award: the arbitrator, therefore, has no direct power over them, and he has clearly exceeded his jurisdiction, in awarding that a certain sum shall be paid on that account. Two cases, indeed, were cited in support of the taxation by the arbitrator, *Shepherd v. Bland* (a), and an *Anonymous Case* (b). Neither of them, however, upon examination, appears to apply to the circumstances of the present case. In the first, it is not stated what were the terms of the reference, and for all that appears, the arbitrators had full power over the costs; the second was a motion to review their taxation, the subject having been expressly referred to them. But in the present case, the subject matter is expressly withdrawn from their jurisdiction.

It was, however, insisted that they would only have the effect of avoiding the award pro tanto; and that the direction to pay 19*l.* 0*s.* 1*d.* would still be good. The general rule, as to excess of jurisdiction, was not disputed; but it was said, that the award of mutual release was so inseparably connected with the vicious award as to costs, that the whole was bad; for that the defendant was entitled to such release, it being the only mode in which the award became final on all the claims referred, and yet that he

(a) Cas. Temp. Hardw. 53.

(b) 1 Chit. Rep. 38.

was unable to insist on such release, without submitting to pay the sum so improperly fixed for the costs.

It appeared to me that there was some weight in this argument; but I think that I am bound by the authority of the case of *Aitcheson v. Cargey*, which was in error from the K. B., and is to be found in 2 Bing. 199, and Millet, 367. In that case there was an award of mutual *general* releases *upon payment* of certain specified sums, and, among other things, of certain costs; it was contended, that as to these, the arbitrators had exceeded their jurisdiction, and it was admitted by the Court that they had; but they, nevertheless, affirmed the judgment of the Court below, and sustained the award for the residue.

This case is, in some respects, stronger than the present; for, besides the distinction between a general and such a release as is here specified, it might, perhaps, be successfully contended here, that on payment of the costs regularly taxed, with the sum of 19*l.* 0*s.* 1*d.*, the defendant might entitle himself to the release. At all events, it is an authority which I ought not to question, and this rule must accordingly be discharged.

Rule discharged.

— See *Heldgate v. Night*. 2*l.* 1*l.* Q.B. 74.

WALLACE v. BROCKLEY.

R. V. RICHARDS shewed cause against a rule nisi obtained by *Peacock* for setting aside a cognovit, on the ground that no attorney was present on behalf of the defendant, who was in custody on mesne process, at the time of executing the said instrument. The words of the rule of 1 Reg. Gen. H. T., 2 Will. 4, s. 72 (a), were: "No warrant of attorney to confess judgment, or cognovit actio-

It is a sufficient compliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72, if the attorney attending for the defendant declares verbally that he subscribes as the defendant's attorney.

dant, without fraud, represents a person not an attorney to be one acting on his behalf, he is still entitled to the benefit of the rule.

(a) Ante, Vol. 1, p. 192.

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net, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending, at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." The mode of witnessing the cognovit was, "witness R. P. Gales, attorney for the above defendant in custody, at his request." It was also sworn that Gales at the time verbally stated himself to have attested as the attorney for the defendant. It was moreover sworn, in support of the rule, that Gales was not an attorney; but it was sworn in answer, that the defendant had represented that person as his attorney at the time of giving the cognovit. The Court would not now permit him to take the objection, that the representation was false. In *Jeyes v. Booth* (a), the marginal note was, "If a defendant in custody, being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney, the Court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney."

COLBRIDGE, J.—I do not agree, that if a man innocently represented a person as his attorney, who was not one, but whom he believed to be one, that that would take the case out of the operation of the rule. In the case cited, the judgment of the Court proceeded on the assumption,

(a) 1 B. & P. 97.

that the representation by the defendant was fraudulent; for *Eyre*, C. J., observed, in the conclusion of his judgment, "the present application is founded on an attempt to cheat the plaintiff." In the present case the attestation is not witnessed by Gales "as" the attorney of the defendant, although he states himself to be the attorney of the defendant.

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R. V. Richards.—The contest on the present motion therefore is, whether the omission of the word "as" is such an omission as renders the attestation insufficient according to the rule. The mere omission of that word in the attestation could not be sufficient, within the spirit of the rule, to render void the cognovit given by the defendant.

Peacock, in support of the rule, contended that the attestation was insufficient, according to 1 Reg. Gen. H. T. s. 72. It might be possible that Gales had acted as the attorney for the defendant on other occasions, but not on the particular one in question. The words of the rule required that the attestation should be in a particular form, and in favour of liberty the Court would require that form to be strictly pursued. In *Fisher v. Nicholas* (a), Mr. Baron *Bayley* said, in speaking of the present rule, "The Court ought to act on the obvious construction of the rule, without considering whether what is done is equivalent."

COLERIDGE, J.—There, it seems to have been held; that the declaration of the attorney, attesting as attorney, ought to be in writing; but it has been since determined, by the full Court of Exchequer, in *Wilson v. Price* (b), that it is a sufficient compliance with the rule, if the attorney who is called in by a defendant in custody to witness a cogno-

(a) Ante, Vol. 2, p. 251.

(b) Ante, Vol. 4, p. 213.

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vit, makes the declaration required by the rule *vivâ voce*. I think, therefore, that as that was a decision of the full Court of Exchequer, I am bound by it (a). The attestation, on the face of it, therefore, I think, is sufficient.

Peacock, in reference to the second objection, that Gales was not an attorney, admitted, that if the defendant had knowingly represented Gales to be an attorney, he would not be entitled to the protection of the rule; but if he was not aware of the fact, and *bonâ fide* represented him to be an attorney, although he was not one, since the rule intended that he should have the protection and assistance which the presence of an attorney gave, the *cognovit* must be considered as void. In *Walker v. Gardner and Others* (b), the defendant had acquiesced in the attendance of an attorney to whom he was not known, and for whom he had not sent. There, the Court held, that the old rule of the 4 Geo. 2, which was in language the same as the present, had not been properly obeyed, and accordingly set aside the warrant of attorney, which the defendant under those circumstances had given. There *Taunton, J.*, who concurred in the opinion of the Court, remarked with approbation on the words of Lord *Kenyon*, in the case of *Hulson v. Hulson* (c), where his Lordship said, "There is great weight in the observation made by the counsel in support of the rule, that the defendant, under the pressure of an arrest, ought to be considered as incapable of waiving the benefit of the rule, and that at all events, and in all cases, he should be protected by the advice of an attorney, expressly attending for him." It was clear, from the affidavits in the present case, that the defendant was unaware that Gales was not an attorney. The Court would, under these circumstances, as the

(a) See *Robinson v. Brooksbank*,
ante, Vol. 4, p. 213.

(b) 4 B. & Ad. 371.
(c) 7 T. R. 7.

provisions of the rule had not been complied with, interfere by setting aside this cognovit.

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COLERIDGE, J.—It has been decided, and is so laid down in Mr. Tidd's last work (a), that where the attorney had not taken out his certificate, the case was within the rule. In the present case the defendant was ignorant that Gales was not an attorney, although he expressly represented him as an attorney. But if he thought he was one, and was guilty of no fraud in his representation, I think he is entitled to the protection of this rule, which was intended for the benefit of those persons who are under some degree of pressure. I am of opinion, therefore, that the present rule must be made absolute.

Rule absolute.

(a) New Practice, pp. 279, 280.

FRANCE v. CLARKSON.

HUMFREY shewed cause against a rule nisi obtained by *Valentine Lee*, for setting aside the cognovit in this case, on the ground that, at the time it was executed, the defendant had not the assistance of an attorney attending on his behalf, contrary to 1 Reg. Gen. H. T. 2 Will. 4, s. 72. It was an action on a judgment, and the defendant had been arrested on a writ of ca. sa. A writ of summons had also been issued upon the judgment. While in execution, under the ca. sa., the cognovit was given. The defendant was in custody at that time on final process, and the rule in question only applied to mesne process. The express words of the rule limited its operation to "any person in custody of a sheriff or other officer upon *mesne* process." The present rule ought, therefore, to be discharged.

1 Reg. Gen. H. T. 2 Will. 4, s. 72, as to the presence of attorneys at the execution of cognovits by prisoners, does not apply to defendants in custody on final process, and the fact of a summons having issued on the judgment is immaterial.

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Valentine Lee, in support of the rule, contended that, as the plaintiff had sued out a writ of summons on the judgment, and was thus taking two remedies in respect of one claim, the Court would not uphold his proceedings (a).

COLERIDGE, J.—It is quite clear that the rule in question only applies to persons in custody on *mesne* process, and not to persons in custody on *final* process. The fact of the writ of summons having been sued out on the judgment makes no difference. The present rule must therefore be discharged, and with costs.

Rule discharged, with costs.

(a) See 43 Geo. 3, c. 45, s. 4, as to costs in actions on judgments.

COLLINS v. BEAUMONT.

Proceedings in sci. fa. on a judgment are within 1 Reg. Gen. H. T. 4 Will. 4 (pleading rules), and consequently must be entitled of a day certain, instead of a term.

HUMFREY shewed cause against a rule nisi obtained by *Mansel*, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign judgment for want of a plea, on the ground, first, that the demurrer to the replication was not in conformity with the terms of Mr. Justice *Patteson's* order made in this case; and secondly, that it was frivolous. The defendant was placed, by the order of the learned Judge, under the terms of pleading *issuably*, rejoining *gratis*, and taking short notice of trial. It was an action of sci. fa., and the defendant demurred to the replication, on the ground that the plaintiff, in that pleading, had adopted the form directed by the new rules of pleading as to the title of the replication (a), instead of the old form, as it was said that proceedings in a sci. fa. on a judgment did not come within those rules. The re-

(a) Ante, Vol. 2, p. 313.

plication was intitled of a particular day, instead of a term. *Humfrey* now contended, that proceedings in sci. fa. could not be considered as coming within the meaning of the new rules any more than ejectment or real actions. The demurrer, therefore, on this ground could not be considered as frivolous.

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Mansel, in support of the rule, contended that the new rules of pleading must be considered as applying to proceedings in sci. fa. on judgments. Such proceedings were only in furtherance of the judgment, and therefore came within the scope and intention of them. However that might be, the defendant had placed himself in a position, which had estopped him from taking the objection, for in the demurrer to the replication, he had intitled his pleading pursuant to the directions of the new rules. The defendant, therefore, had by this means treated the proceeding as within the new rules. The demurrer consequently must be considered as frivolous.

COLERIDGE, J.—I think the present rule must be made absolute. On the question, whether proceedings in sci. fa. are or are not within the new pleading rules; I think they are, and have been so treated by the parties all through the proceedings. The action of ejectment could not have been intended to come within those rules, it depending on a fiction, and being the creature of the Court. As to real actions, they cannot be considered as coming within the scope of the rules, for they are not actions over which the Courts have concurrent jurisdiction. Proceedings in sci. fa., when they are used merely to enforce a judgment between the same parties, may be treated as a continuation of the original action. The present rule must therefore be made absolute for setting aside the demurrer, the defendant having liberty to amend.

Rule accordingly.

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If, in a joint affidavit, the addition of one deponent is defective, the statement made by the other in the affidavit may, notwithstanding, be read.

Ex parte EDMONDS.

W. H. WATSON shewed cause against a rule nisi obtained by *Chilton*. He took a preliminary objection to the affidavit, on which the rule was obtained, on the ground of a defect in the addition of one of the deponents making the affidavit. It was a joint affidavit by two persons, and the addition to one was defective. This, he submitted, prevented the affidavit from being read by whichever of the deponents the statements contained in it might be made. He cited *Rex v. The Justices of the County of Caernarvon* (a), in the marginal note to which it was stated that "where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application."

Chilton supported the rule, and contended that the mere fact of the addition of one deponent being defective could not vitiate that part of the affidavit made by the other deponent. It was the constant practice of the Court to receive such affidavits, and allow the parties to make use of them.

COLERIDGE, J.—Although the addition to one of the deponents is defective, that part of the affidavit which is made by the other deponent is correct. With respect to the case of *Rex v. The Justices of the County of Caernarvon*, the decision of the Court must have proceeded on the peculiar circumstances disclosed in it. I think the affidavit may be read, with the limitation I have mentioned.

Cause was afterwards shewn on the merits, and the rule was made absolute.

Rule absolute.

(a) 5 N. & M. 364.

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Ex parte COOPER.

W. ALEXANDER, on the 2nd June, applied for an order to be directed to the examiners of attornies, requiring them to receive the articles of clerkship of Mr. Cooper, and to examine him in the present term for the purpose of his admission. By one of the rules which the examiners had laid down (*a*), it was required, that the articles of clerkship, and answers to questions touching the due service and conduct of persons applying to be admitted attornies, are to be left with the Secretary of the Incorporated Law Society at the Hall in Chancery Lane, on or before the 30th May. In the present case, Mr. Cooper's articles did not expire until the 1st June; that was the reason for the articles not being deposited, and moreover it was impossible for the gentleman to whom Mr. Cooper had been articulated to certify the due service of the clerk with him before that day. The examiners had, however, refused to receive the articles, although the examination day was not until the 5th of the month. Under these circumstances, it was hoped, that the Court would make an order compelling the examiners to receive the articles and certificate now.

Where the articles of a clerk expired on the 1st June, and the time at which they ought to have been deposited at the hall of the Incorporated Law Society, pursuant to the rules of E. T., 6 Will. 4, had ended on the 30th May, and the day of examination was the 5th June, the Court, on the 2nd June, ordered the articles to be received.

Cur. adv. vult.

COLERIDGE, J., (after consulting Master Le Blanc).—I think, under the special circumstances in this case, the order prayed may issue.

Order granted.

(*a*) Ante, p. 6.

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DEBNEY v. CORBETT and Another.

Where a distress is made under the authority of one local act, and the notice of distress states it to be made under another, and the plaintiff discontinues an action brought in respect of that distress, the mistake as to the act authorizing the distress does not interfere with the defendant's claim to treble costs under that act, in case of discontinuance, although the plaintiff may have adopted a form of action not contemplated by the protecting act.

PETERSDORFF shewed cause against a rule obtained by *Hoggins*, calling on the plaintiff to shew cause why the Master should not review his taxation of the defendants' costs. It was an action of trespass, for an alleged distress for 14*l.* 18*s.* 4*d.* in respect of paving rates, made by the defendant Corbett as collector, and the other defendant as broker, under a public local act of the 50 Geo. 3, c. clxx., intituled "An Act for paving and otherwise improving certain streets, and other public passages and places, which are or shall be made upon a certain piece of ground belonging to Thomas Harrison, Esq., situate in the parish of St. Pancras, in the county of Middlesex;" and also under the 57 Geo. 3, c. 29, commonly called the Metropolitan Paving Act; which sum the plaintiff paid without protest immediately after the distress. The declaration was in the common form, without describing the defendants as acting under any statute. Plea, Not guilty, by both defendants jointly. The question was, whether, with reference to the contents of the notice of distress, the period at which the action was commenced, as regards the limitation of time, &c., by the above statutes, and the form of the pleadings, the plaintiff, who had discontinued his action in the usual manner, should pay treble or only single costs. At the taxation before Master Goodrich, the defendants' attorney claimed treble costs, pursuant to the 64th section of the first-mentioned statute (50 Geo. 3, c. clxx.), on the general ground of his clients having been sued in respect of something done under that act. The words of the section referred to were, "And be it further enacted, that no suit or action shall be commenced against any person or persons for anything to be done in pursuance of this act, until twenty-one days' notice thereof shall be given to the clerk to the said commissioners, or after such sufficient

satisfaction or tender thereof hath been made to the party or parties aggrieved, or after three calendar months next after the fact committed, and every such action or suit shall be brought and tried in the county of Middlesex, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if the same shall appear to be so done, and if such action or suit shall be brought before twenty-one days' notice thereof shall be given as aforesaid, or after sufficient satisfaction made or tendered as aforesaid, or after the time hereinbefore limited for bringing the same, or shall be brought in any other county or place as aforesaid, then the jury shall find a verdict for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action or suit after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, then the defendant or defendants shall recover treble costs, and have such remedy for the same as any defendant or defendants hath or have for costs of suit in any other cases by law." The plaintiff's attorney objected, first, that the notice of distress served on his client, which he produced, stated the distress to have been made, not under the above statute, the 50 Geo. 3, c. clxx, but under another of the 48 Geo. 3, relating to adjoining, but totally different, property, belonging to the Skinners' Company. Secondly, that no notice of action was given to the clerk to the commissioners, and that the action was not commenced within the time limited, either by the above clause or by the Metropolitan Paving Act above referred to. Thirdly, that there was nothing on the face of the pleadings to shew that the action was brought against the defendants for any thing done in pursuance of

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any act of parliament whatsoever. For the purpose of raising the question, Master Goodrich proceeded to allow single costs only. The 50 Geo. 3, directed the rate to be paid by the occupier of the premises, so that the plaintiff, who is the owner, would not have been liable under that act alone. But by the other act (57 Geo. 3) all streets, &c. within the parish of St. Pancras are brought within the provisions of that act (s. 1); except the estates of the Marquis of Camden and Lord Somers (s. 139). Paving acts (local) are not repealed, but commissioners appointed therein to retain their authority, and to act either under such local acts or under that act (s. 138). Where annual value of tenements should not exceed 20*l.*, owners to be deemed the occupiers, and to be rated and assessed accordingly (s. 33). Persons rated by this or any local act, refusing or neglecting to pay, to be summoned before a justice, and in case of default, such justice to issue a warrant of distress to the collector, &c. of the district, and if arrears and expenses be not paid within five days, goods to be sold (s. 35). But no notice of distress is directed where a distress is authorized by any local act: constable, &c. to assist the collector in executing the distress pursuant to magistrate's warrant (s. 36). Form of warrant of distress given (s. 37). No form of the warrant to distrain is prescribed by the above local act, (50 Geo. 3), but the warrant in the present case was in accordance with the form contained in the other act, and the same was directed to the defendant Corbett as the collector of the paving and other rates for the Harrison estate. With respect to the mistake in the notice of distress, it appeared that the defendant Corbett (who died after issue joined), was collector to the Skinners' estate also, and that in the hurry of the moment he filled up the wrong printed form. But the sum distrained for was rightly stated. With regard to the pleadings not shewing that the defendants were sued in respect of any thing

done under either of the above acts, the fact of their having been so sued was before the Court on a positive affidavit made in support of the rule. There were several authorities to shew that, after a rule to discontinue, the Court, on proof of the party's right, has ordered double and treble costs to be taxed, as the particular case might require. In the present instance, the plaintiff, as above stated, was made liable to treble costs, after verdict, nonsuit, or discontinuance. Should any thing turn upon the mistake in the notice of distress, the 50 Geo. 3 contains the following clause: "And be it further enacted, that where any distress shall be made for money to be levied by virtue of this act, the distress itself shall not be declared unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in any proceedings relating thereto, nor shall the party or parties distraining be deemed a trespasser or trespassers ab initio, on account of any irregularity which shall afterwards be done by the party or parties distraining, but the person or persons aggrieved by such irregularity may recover full satisfaction for the special damage only in an action upon the case." The defendants' attorney gave a receipt for the single costs as taxed, but without prejudice to the present application for a review.

Petersdorff now contended, that after giving a notice of distress under one statute, they could not avail themselves of the other. By giving such an informal notice the plaintiff had been deceived, and induced to bring his action, he being quite unaware that the defendants had such a protection as the one given by the other statute. Again it was to be observed, that the defendants were only to have this protection in an action "upon the case;" whereas the present action was trespass.

Hoggins, in support of the rule, contended, that it did

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not appear from the affidavits, that the mistake in the notice of distress had led to this action, and therefore it would not be presumed that such mistake was the reason for bringing it. It was clear that this action was brought against the defendants for something done in pursuance of the act of the 50 Geo. 3, and that act provided that in such a case, if the plaintiff discontinued, the defendants were entitled to treble costs. The mere mistake in stating the particular act, under which the distress was made, could not deprive the defendants of the protection which the 50 Geo. 3 threw around them. As to the argument, that the defendants were not entitled to treble costs, because the action was trespass instead of case, it could not be contended with success, that a plaintiff might deprive a defendant of his right by bringing his action in a form different from that which the act of Parliament authorized. He cited *Finlay v. Seaton* (a).

Cur. adv. vult.

WILLIAMS, J., afterwards gave judgment.—This was an application calling on the plaintiff to shew cause why the Master should not review his taxation, he having allowed the defendant single costs only; and the question was, whether under the circumstances he should not have allowed treble costs, according to the provisions of the statute 50 Geo. 3, c. clxx. s. 65. By that section it is provided, that if the plaintiff in any action against any person for any thing done under or by virtue of that act should become nonsuit, or discontinue his suit, &c., he should pay treble costs to the defendant; and the question is, whether, under that section, treble costs ought to be allowed, or single costs only? The question arose thus: a distress was made on the plaintiff for arrears of

(a) 1 Taunt. 210.

1837.

DEBNEY
v.
CORBETT
and
Another.

rates, and it was described in the notice of distress served in the following terms :—" Take notice, that by virtue of a warrant to me directed, I have distrained the goods and chattels in the annexed schedule specified for the sum of 14*l.* 18*s.* 4*d.*," (this sum was properly described), " for so much rate for paving duty made under the statute 48 Geo. 3, intituled An act, &c. due at Lady-day, 1833." Now this was a misrecital and a misdescription of the act, for the 48 Geo. 3 was a different act from that on which the proceeding was really had, and on which the parties acted, that is, 50 Geo. 3, c. clxx. I have observed that the precise amount was truly stated, the reason of the distress was also, and there was only a misrecital and misdescription of the act; and the question mainly is, whether this mistake in the recital of the act under which the parties undertook to act, will preclude me from taking notice that they were really acting under the 50 Geo. 3, c. clxx. It appears by the affidavits, that the counsel who advised the plaintiff did not think so; for they thought, that if a party making a distress had good and tenable grounds for doing so, he might avail himself of it. If they had not thought so, they would not have recommended the plaintiffs to discontinue this action. This is an old principle, and the Court recognised it in the case of the *Governor of the Poor of Bristol v. Wait* (a), and I am therefore not precluded from looking at the real acts of the parties. Then, if that was so, I am satisfied that these defendants were acting under the statute of 50 Geo. 3, c. clxx.; and that they had an undoubted authority so to act. But it is next said, that under the 64th section of that act, where any distress is improperly or informally made under that act, the persons making it are not to be considered as trespassers ab initio, but that the persons aggrieved are to recover full satisfaction in an action on the case. Now it is contended,

(a) 1 Adol. & Ell. 264.

1887.

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that as this is an action of trespass in its form, it is impossible on the present occasion for the defendants to say that they were acting under 50 Geo. 3, as an action of trespass could not be maintained. I cannot, however, assent to that argument. Because the plaintiff is mistaken in his course of proceeding, that is not to prevent the defendant from saying he was acting under the statute. It cannot have the effect of rendering his past acts unwarranted. Suppose the plaintiff had brought an action of debt on some supposed penalty, which is not in fact given by the statute; if the defendants had really been acting under the statute, would that form of action extinguish their rights? So, here, the plaintiff brings an action of trespass, instead of case: that is his own blunder, but it cannot affect the rights of other parties. For these reasons, I think the Master, when he allowed the single costs only, (which he did in order to bring the question before the Court), was incorrect, and that, therefore, the rule must be made absolute.

Rule absolute.

HOOPER v. VESTRIS.

An affidavit of debt, stating the defendant to be indebted to the deponent "on an account stated between them," is insufficient.

W. H. WATSON shewed cause against a rule nisi obtained by *Archbold*, calling on the plaintiff to shew cause why the bail bond in this case should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt. The affidavit stated that the defendant was indebted to the plaintiff "for money found to be due to this deponent by the said Eliza Lucy Vestris on an account stated between them." The objection was, that the affidavit ought to have alleged "an account stated and settled by and between them," or "stated by them." It was submitted, however, that the allegation in the affidavit of debt was sufficient. In the forms of declarations given

by the Judges in the rules of Trin. Term, 1 Will. 4, the words were "on an account then and there stated before them (a)." If the allegation were changed for the suggested one, no greater certainty would be attained.

1837.
 HOOPER
 v.
 VESTRIE.

Archbold, in support of the rule, contended that all the statements made in this affidavit might be true, and yet not a farthing be due from the defendant to the plaintiff. Where there was so much uncertainty in the mode of alleging the existence of the debt, the Court would not think the defendant ought to be held to bail.

COLERIDGE, J.—I think the test which is suggested in support of the rule is a good one for the purpose of trying the sufficiency of this affidavit. It is consistent with the statements contained in it, that no debt is really due from the defendant to the plaintiff. I think, therefore, that the affidavit is bad. The rule must, therefore, be absolute for delivering up the bail-bond to be cancelled.

Rule absolute (b).

W. H. Watson afterwards applied for leave to arrest the defendant a second time for the same debt, but which was refused.

(a) Ante, Vol. 1, p. 113. (b) See *Tyler v. Campbell*, ante, p. 632.

LEWIS v. GRIMSTONE.

HOGGINS shewed cause against a rule obtained by *J. W. Smith*, for setting aside the service of the writ, or for staying proceedings against the bail, on payment of the costs of the writ. The *capias* had been returnable in the original action on the 22nd May. The sheriff returned non est inventus on that day. The plaintiff took

After notice of render it is irregular to serve a writ on the bail, although it may have been sued out previous to the notice given to the plaintiff.

1837.

LEWIS
v.
GRIMSTONE.

an assignment of the bail-bond, and sued out a writ of summons against the bail. In the latter part of the day the defendant rendered, and notice of the render was served on the plaintiff in the evening. The next morning the writ of summons was served on the defendant. The question then was, whether the service of the writ was regular, after notice of the render. *Hoggins* submitted, on the authority of *Byrne and Another v. Aguilar* (a), and *Abbot v. Rawley* (b), that the proceedings could only be stayed on payment of costs.

J. W. Smith, in support of the rule, contended that the case of *Byrne and Another v. Aguilar*, was an authority to shew that, after notice of render, all proceedings against the bail must be stayed, and any subsequent step is irregular. In *Smith v. Lewis* (c), a decision was pronounced in exact conformity with the present rule. There, it was held that bail, having rendered their principal in time, according to the practice of the Court, are entitled to stay proceedings in an action on their recognizance, without costs, though the plaintiff commenced his action before he was served with the notice of the render. The Court determined, in the case of *Crestwell v. Hern* (d), that bail having rendered their principal within the eight days allowed by the rule of Trinity, 1 Anne, are not liable to the costs in an action on the recognizance, up to the time of the notice of render, when the proceedings were stayed. The result of the cases therefore was, that the plaintiff was irregular in proceeding against the bail after notice of render served, and that in such a case the Court would not allow him his costs.

COLERIDGE, J.—The decisions on this point are contradictory. In this, however, they all agree, that, after notice

(a) 3 East, 306.

(b) 3 Bos. & Pul. 13.

(c) 16 East, 168.

(d) 1 M. & Sel. 742.

of the render, the service of the writ was irregular. The first part of the rule therefore for setting aside the service of the writ must be absolute.

Rule absolute accordingly.

1837.
LEWIS
&
GRIMSTONE.

Another action against *Wheatley* by the same plaintiff, in which the circumstances were similar, was disposed of in the same way.

FEARON v. WHITE.

CLEASBY moved for a rule to shew cause why a commission should not issue in this case under 1 Will. 4, c. 22, s. 4, for the examination of witnesses in Scotland. The application was for a rule nisi only, but the names of the examiners were not mentioned in the affidavit on which the application was founded.

It is not necessary, on applying for a rule nisi under 1 W. 4, c. 22, s. 4, for a commission to examine witnesses out of the jurisdiction, to state the names of the examiners.

COLLIER, J.—The rule is not absolute in the first instance; and the names of the examiners may be mentioned, when the matter comes to be discussed, on shewing cause against the rule.

Rule nisi granted (a).

(a) See *Doed. Thorn v. Phillips*, of the examiner must be mentioned at the time of moving for the rule nisi. ante, Vol. 1, p. 56, where it was held by *Taunton, J.*, that the name

Ex parte Bumps and Others.

R. v. RICHARDS applied on the first day of term, on behalf of several articulated clerks, for an order, that the notices of the persons on whose behalf he applied might be considered as having been delivered into the Master's office in due time. The necessity of coming

Under 5 Reg. Gen. H. T. 6 W. 4, as to notices of applications to be admitted as an attorney, Sunday will reckon as one day.

1837.

Ex parte
BUMPS
and Others.

to the Court arose from a doubt which existed as to the mode of calculating the time limited in 5 Reg. Gen. H. T. 6 Will. 4 (a). The words of that rule were, "That three days at least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotaries' office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices." The question was, whether the "three" days mentioned in the rule, meant three *clear* days or not; or, if it did, then, whether a Sunday would count as one of them? In the cases which formed the subject of the present application, the notices had been delivered on the Thursday, and the term began on the Monday. If the days were reckoned clear days, and Sunday was calculated as one, the notices had been delivered in time.

COLERIDGE, J.—I am of opinion that the Sunday would so reckon.

Order accordingly.

(a) Ante, Vol. 4, p. 554.



BENBOW's Bail.

If the addition of bail, in an affidavit of justification, is omitted, it is a fatal defect.

BALL opposed bail, on the ground that the addition of the bail was not stated in the affidavit of justification. He cited *Treasure's Bail* (a) in support of the objection.

COLERIDGE, J.—That appears to me to be a fatal objection.

Bail rejected.

(a) Ante, Vol. 2, p. 670.

1837.

GRAFF *v.* WILLIS.

DENMAN WHATLEY moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the plaintiff had not delivered the particulars of his demand to the defendant, pursuant to a Judge's order made for that purpose. The defendant was thus compelled to remain in custody, without any means of obtaining his liberty, in consequence of the plaintiff thus capriciously withholding the nature of his demand.

The fact of a plaintiff withholding the particulars of his demand, in disobedience to a Judge's order, is not a ground for discharging a defendant out of custody.

WILLIAMS, J.—That is no ground for discharging the defendant out of custody. If the plaintiff does not deliver his particulars, the defendant must pursue the usual course in such cases.

Rule refused.

In the Matter of WHICHER.

GASELEE moved to make a rule absolute, which required an attorney to answer the matters contained in the affidavit on which the application was founded. He produced an affidavit of service of the rule on the attorney, but no one appeared to oppose the application.

When it is sought to make a rule absolute against an attorney, requiring him to answer the matters in the affidavit, and he does not appear, he must be called in Court.

COLERIDGE, J., (after consulting Mr. Hill, the Clerk of the Rules).—As he does not appear, and you move to make the rule absolute, the proper course is to have him called in Court.

The attorney was accordingly called, but did not appear.

Rule absolute.

1857.

DON d. MESSER v. ROE.

Service on the servant of the tenant in possession, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, is sufficient for a rule nisi for judgment against the casual ejector.

If the name of one tenant is improperly spelled in the notice served on another, it is immaterial for the service on the latter.

J. BAYLEY applied for leave to sign judgment against the casual ejector. The premises in question were inhabited in different parts by three separate tenants. The service on two of them was perfectly regular. With respect to the third, whose name was Hannah Ferris, the affidavit on which he moved disclosed these facts :—The deponent went to the premises, and was answered by a servant of the tenant, that her mistress was ill in bed, and could not be seen. The defendant then explained the nature of the notice, and the object of the declaration, to the servant, and gave her a copy. She then proceeded up stairs, and after an absence of about five minutes returned, and informed the defendant that she had delivered it to the tenant.

COLERIDGE, J., granted a rule nisi on this affidavit.

J. Bayley then observed that there was another peculiarity in the case, which was, that the name of one of the other tenants mentioned in the notice was improperly spelled in the copy served on Hannah Ferris. The service on the tenant, whose name was so introduced, was regular.

COLERIDGE, J.—In my opinion, that is not material. The rule will, therefore, be absolute as to the two tenants, and nisi as to Hannah Ferris.

Rule accordingly.

1837.

Ex parte SHARPE.

WHITMORE shewed cause against a rule nisi obtained by *Humfrey*, which called upon an attorney to pay over a sum of 21*l.* 17*s.* 1*d.* received by him for his client, who was plaintiff in a cause of *Sharpe v. Hawker*. The action had been commenced more than nine years before, and the defendant having paid the debt soon after its commencement to the plaintiff's attorney, he retained it in his own hands from that time down to the making of the present application. The lapse of time since the cause of complaint arose before the making of the present application was a sufficient answer to it. He cited *Ex parte Yeatman (a)*, which was an application against an attorney for the purpose of compelling him to refund a sum of money to his client. There, a period of thirteen years had elapsed between the time when the money came into the attorney's hands, and the time when the application was made. Here, although only nine years had elapsed, the same principle on which that case was decided would apply. Mr. Justice *Littledale*, who decided that case, used these expressions:—"Had an action been brought, or a bill in equity filed, the statute of limitations might have been pleaded, unless there was some legal reason alleged to account for the delay in bringing the action. I apprehend this Court would not interfere summarily in a way analogous to the bringing an action by the client, unless it appears that he was not either a free man or in the power of the attorney. This application might have been made earlier, and no reason has been given why he did not come sooner to the Court. The statute of limitations has run since this money was paid, and therefore I think this application comes too late. The present rule must therefore

Where an attorney has received money from the defendant in a cause, on account of his own client, who is plaintiff, the delay of nine years, though unaccounted for, will not prevent the account between him and his client being referred to the Master.

[(a) Ante, Vol. 4, p. 304.]

1837.

Ex parte
SHARPE.

be discharged, and with costs, as it was moved with costs." The principle of that case was, that where the statute of limitations had run, the Court would not interfere summarily against an attorney. Here, the statute had run, and therefore the present application must fail.

Humfrey, in support of the rule, contended, that the mere lapse of time was not a sufficient ground for not referring the accounts between the parties to the Master. In the case of *Ex parte Yeatman*, thirteen years had elapsed; whereas here only nine years had passed. Although Mr. Justice *Littledale* in that case referred to the fact that the statute of limitations had run before the application was made, it could not have been on that principle that he refused to interfere; for, in *Evans v. Duncombe* (a), the Court intimated an opinion that it would compel an attorney to perform an undertaking entered into by him, notwithstanding it is void by the statute of frauds, and no action can be brought upon it. In the present case, if the defendant pleaded the statute of limitations, the client might be deprived of his remedy, but that would not interfere with the client's right to have the account examined before the master. In the case of *In re Paterson* (b), the marginal note was "where an attorney of one Court gives an undertaking as an attorney for a debt and costs in an action in another, the Court of which he is an attorney will compel him to fulfil his undertaking, though void by the statute of frauds." That case was decided on the authority of "*In re Greaves* (c)," which was to the same effect: the Court observing in that case: "An attorney is cognizant of the law; and if he gives an undertaking which he must know to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced." Under these circumstances, therefore, nothing

(a) 1 Cr. & J. 372.

(b) Ante, Vol. 1, p. 468.

(c) 1 Cr. & J. 374, n.

had been shewn, which at all excused the attorney from submitting the accounts between himself and his client to the inspection of the Master.

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COLERIDGE, J.—I do not think it was laid down by Mr. Justice *Littledale*, in the case of *Ex parte Yeatman*, that he would not interfere, merely because the period prescribed by the statute of limitations had elapsed. He only considered that fact as guiding him in determining whether he would exercise his summary jurisdiction in compelling the attorney to account. The question is, whether the lapse of time in this case is such that an attorney ought not to be called on summarily to let the accounts between himself and his client be inquired into. I should have wished a reason on the one side why an account had not been called for before, and why, on the other side, in consequence of the delay, justice could not be done. It appears by the affidavits, that he had received a sum of money from a person whom his client had instructed him to sue. His duty there was to tax his costs, and pay over the balance to his client. This, however, he has not done. The case is different from that of *Ex parte Yeatman*, for there, the money was voluntarily paid by the client to his attorney, under a particular arrangement, and then the client allowed the period of thirteen years to elapse without requiring any account of that money. But here, the attorney has neglected the performance of his duty, and has not given any reason for that neglect. I think that, under these circumstances, the application on the part of the client is not barred merely by the lapse of time. I think that justice will be best done by referring the matter generally to the Master, without any restriction as to the statute of limitations, and I do not think that he will consider himself bound by that statute, so as to prevent him from going into the whole inquiry.

Rule absolute accordingly.

1837.

In order to obtain judgment against the casual ejector, it is necessary that a service should be shewn on the "tenant in possession;" a service on the last person in possession is insufficient, although there may be a difficulty in ascertaining who is the tenant in possession.

DOE *d.* FRASER *v.* ROE.

N. CLARK moved for judgment against the casual ejector. There was some difficulty in ascertaining who was the tenant in possession of the premises sought to be recovered. The affidavit, therefore, swore to a service of the declaration on the person last in possession. This, under the circumstances, the Court would think sufficient.

COLERIDGE, J.—The practice always is to require the person making the affidavit of service to swear that the "tenant in possession" has been served. Without such an affidavit, you cannot have your rule. Either there is a tenant in possession, or there is not. If there is, you must swear to a service on him. If there is not, you must adopt a different course.

Rule refused.

PRESTON *v.* WHITEHEART.

Where a plaintiff's attorney accidentally gives credit in his particulars for a sum of money, which the defendant sets up as a cross demand, the court will allow the particulars to be amended on terms.

R. V. RICHARDS shewed cause against a rule nisi, obtained by *Henderson*, calling on the defendant to shew cause why the plaintiff should not be at liberty to amend the particulars of the plaintiff's demand, which had been delivered. It appeared from the affidavits, that an account had been delivered by the defendant of certain claims, which he alleged himself to have upon the plaintiff, to the attorney of the latter. When the plaintiff's attorney made out the particulars of his client's demand, the claim set up by the defendant was, by mistake, introduced into them, giving credit for that sum. It was now sought to amend the particulars by striking that sum out. An order for that purpose had been applied for to a Judge at Chambers, and refused. *R. V. Richards* contended, however, that the

plaintiff was bound by his particulars, and that, although the sum claimed by the defendant against the plaintiff might have unintentionally been admitted in the particular, it was a just demand by the defendant.

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 PRISTON
 v.
 WHITEHEART.

Henderson, in support of the rule, submitted that the mistake accidentally made in the particulars ought not thus to bind the plaintiff.

COLERIDGE, J.—The present rule may be made absolute, the defendant having fourteen days time to plead, after the amended particulars shall be delivered.

Rule absolute accordingly.

HODD v. LANGRIDGE.

PEACOCK shewed cause against a rule obtained by *Heaton*, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Surrey, on the ground of the plaintiff's name being omitted in the copy of the writ of capias served on him at the time of arrest. He objected that the affidavit on which the application was founded did not shew any connexion between the defective copy served on the defendant and the plaintiff; for, it did not appear that a defective copy of the process had been served by the plaintiff himself on the defendant, or by the sheriff at the instance of the plaintiff. He might have been arrested regularly, and served regularly by the plaintiff as far as he was concerned, by delivering a regular copy to the sheriff.

If a defective copy of a writ of capias is served on a defendant, the Court will presume, that a defective copy was delivered to the sheriff, and therefore, it is not necessary for the defendant to shew, that such a copy was delivered by the plaintiff to the sheriff.

COLERIDGE, J.—I think the defendant has done enough to call on the plaintiff for an answer. I cannot presume

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v.
LANGRIDGE.

that the sheriff is wrong. It was the plaintiff's duty to deliver a true copy to the sheriff, and I am to presume that he received it, and served it regularly. I cannot presume, that, having received a correct copy, he served a defective one. Unless an answer is given to the application in point of fact, the present rule must be made absolute with costs.

Rule absolute, with costs.

Ex parte FOUNDLING HOSPITAL.

Where an infant under two months old was deserted at the door of the Foundling Hospital, the Court issued a writ of mandamus in the first instance to the directors of the poor of the parish, constituted by a local act, commanding them to receive the child, although the application was made at the instance of a stranger, who took care of the child from humane motives.

BODKIN moved for a rule to shew cause why a writ of mandamus should not be issued to the directors of the poor of the parish of St. Pancras, commanding them to receive a certain male child under the age of two months, and whose name was unknown, on the facts disclosed in affidavits on which the application was founded. They stated that a woman came to the hospital door, and after inquiring of the porter for the treasurer, she delivered to him a bundle, with directions to him to have it carried to the treasurer. The porter took the bundle, laid it down, and sent to seek for some one who might take it as directed. A few minutes after, the bundle being observed to move, it was examined, and discovered to contain a male child, whose age did certainly not exceed two months. Search and inquiry were immediately made for the woman, but she had gone away, and could be discovered nowhere. Out of humanity, a nurse and other necessities were supplied at the instance of the treasurer. Application was subsequently made to the directors of the poor of the parish, acting under a local act, who refused to take the child. The application was repeated, but they persisted in their refusal, and expressed their willingness to try the question as to their liability. Under

these circumstances the present application was made, in order to compel them to receive the child, as, without the mere charitable interference of the treasurer of the hospital, it must certainly perish.

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Ex parte
FOUNDLING
HOSPITAL.

COLERIDGE, J.—I will take the case into my consideration, and give my opinion in a few days.

Cur. adv. vult.

COLERIDGE, J.—I have consulted the other Judges, and we are of opinion that it is much too doubtful a case for the Court to abstain from interfering. The writ of mandamus must go at once, without the preliminary proceedings of granting a rule, and shewing cause against it.

Rule accordingly.

FRANK v. JAMES.

THOMAS moved for a rule to shew cause why the defendant in this case should not be discharged out of custody, on the ground of a defect in the writ of capias on which he had been arrested. The objection was, that it was directed "To the Constable of the Castle of Dover," instead of "To the Constable of Dover Castle," as was directed by the form contained in the schedule to the Uniformity of Process Act. The forms given by the statute had always been required by the Courts to be strictly pursued.

It is no objection to a writ of capias, that it is directed to the constable of "the Castle of Dover," instead of "Dover Castle," as in the schedule to the Uniformity of Process Act.

COLERIDGE, J.—I think that is no objection to the writ, so as to authorize his being discharged out of custody.

Rule refused.

1837.

SOWTER v. HITCHCOCK.

In an action of covenant by the assignee of a lease, for non-payment of rent and non-repair, the Court will not compel the plaintiff to give particulars, with sums and dates.

R. V. RICHARDS shewed cause against a rule nisi obtained by *Hoggins*, requiring the plaintiff to shew cause why he should not give further and better particulars, with sums and dates attached. It was an action of debt by the assignee of a lease against the tenant for breach of covenant in non-payment of rent, and non-repair. The particulars which had been already given, stated generally the causes of action, but without dates or sums. It did not appear from the affidavits, how long the tenant had been in possession of the premises in question; and there was no power for the landlord to enter and examine the premises. Under these circumstances, the Court would hardly think it right that the plaintiff should be compelled to give a more full particular of the grounds of his action. The object of granting particulars, was to inform the defendant of the nature of the claim which the plaintiff set up against him. In the present instance, the defendant must be perfectly aware of the amount of rent due from him to his landlord, as well as the extent of non-repair in which the premises were left. The plaintiff being only an assignee of the lease, and the defendant having been in possession long before the assignment was executed, he was better aware of the grounds on which the plaintiff proceeded than the plaintiff himself could be. The present was not like a case in which a landlord sought to enforce a forfeiture, in consequence of the non-performance of covenants. It was submitted, that, under these circumstances, there was no pretence for granting this application.

Hoggins, in support of the rule, cited the case of *Doe d. Birch v. Phillips (a)*. That was an action of ejectment

(a) 6 T. R. 597.

for a forfeiture of a lease, and the defendant applied to the Court to compel the lessor of the plaintiff to give a particular of the covenants, breaches, times when, &c., on which he meant to insist, that the defendant had forfeited the lease, and that he should not be permitted to give evidence on the trial of any thing not contained in those particulars. There, the Court, thinking that the application in its full extent was highly reasonable, made the rule absolute. This case, it was contended, furnished a direct authority in support of the present application.

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SOWTER
v.
HITCHCOCK.

COLERIDGE, J.—I think that case is distinguishable from the present. That case has, in fact, no bearing on this. Nothing is more distinct than the case in which a landlord seeks to take advantage of a forfeiture against his tenant, and that in which he sues merely for a breach of covenant. As to this particular application, the plaintiff does not seem to know more than the defendant. There is no reason for supposing, therefore, that, if the application were granted, any better particulars could be given by the plaintiff. If it should be said that the plaintiff may suggest breaches instead of assigning them, and that thus the plaintiff may be placed in a situation of difficulty, the defendant may then go before a Judge at Chambers, who will see what is right to be done. The present rule must therefore be discharged.

Rule discharged.

1837.

BURT v. BRYANT.

If a defendant, desirous of being removed by a habeas corpus from the Fleet to the King's Bench Prison, pays a fee properly due from the plaintiff to the Warden, on commitment to the custody of the latter, he cannot afterwards summarily compel the plaintiff to reimburse him.

C. C. JONES shewed cause against a rule obtained by *Humfrey*, calling on the plaintiff and his attorney to shew cause why they should not return the commitment fee paid by the defendant to the Warden of the Fleet. It appeared from the affidavits that the defendant had been for a considerable time a prisoner in the custody of the Marshal of the King's Bench. While in such custody, the plaintiff in the present case signed a judgment against him in the Court of Exchequer. He was accordingly removed by habeas corpus into that court, for the purpose of being charged in execution. Being so charged, he was committed to the Fleet Prison. When taken there, the plaintiff omitted to pay the commitment fee to the Warden. Subsequently, the defendant obtained a writ of habeas corpus for the purpose of removing himself back to the King's Bench Prison. The Warden then, previous to his removal, required him to pay the commitment fee. The defendant accordingly paid the fee, and was then taken to the King's Bench Prison. The object of the application was, that this fee might be repaid either by the plaintiff or his attorney, to the defendant, as it was the duty of the plaintiff to pay it on charging the defendant in execution. Even supposing the plaintiff to have been bound to pay that fee, the defendant had in his own wrong paid it, for, he was not bound to pay it. The Warden could have no right to enforce payment by keeping the defendant in custody, and, if he had attempted so to do, the defendant might have applied to the Court to enforce obedience to the writ of habeas corpus. No authority could be shewn for the present application, and therefore the rule ought to be discharged.

Humfrey, in support of the rule, contended that the constant and regular practice was, that the party commit-

ting the defendant should pay the warden's fee; consequently the payment by the defendant was to the use of the plaintiff, and he ought therefore to be compelled to repay it to the defendant. As to the argument, that the defendant had paid it in his own wrong, it was to be remembered that the defendant was a prisoner, and must of course remain in the custody of the warden, until the fee was paid. Under such circumstances, it was much more convenient that the defendant should pay the fee, and afterwards obtain reimbursement from the plaintiff, than that he should be compelled to contest the matter with the warden.

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COLERIDGE, J.—I am of opinion that this rule cannot be made absolute. It cannot be supported without asserting and admitting that it was the plaintiff's duty to pay this fee. If it was the plaintiff's duty to pay it, what right had the warden to ask the defendant for it, and why did the latter pay it? He ought not to have paid it, but should have called upon the warden to obey the order of the Court, which it would have compelled him to do, and would not have allowed as an excuse, for disobedience to that order, that some other person had not paid a fee which it was his duty to have paid on some previous occasion. It would have been much better for him to have applied to the Court for a rule calling on the warden to obey the writ, than to have paid the fee first, and then have come to the Court to endeavour to make the plaintiff reimburse him. It is much better that parties should proceed in a straightforward and usual way. The present rule must therefore be discharged, but without costs.

Rule discharged, without costs.

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REX v. Inhabitants of WITNEY.

The inhabitants of a parish cannot be discharged from an indictment for the non-repair of a highway, until it is ascertained whether the repairs effected will stand during a winter.

R. V. RICHARDS shewed cause against a rule obtained by *Greaves*, calling on the prosecutor of the indictment for non-repair of a highway to shew cause why, on the payment of the nominal fine of 6s. 8d., the inhabitants of the parish who were defendants should not be discharged from the indictment. The rule had been obtained on producing the certificate of two magistrates, that the road had been put into good repair, and was likely so to continue. *R. V. Richards* submitted, however, that the application was premature, because the date of the certificate was in the month of May, and consequently an opportunity had not been afforded to the magistrates adequately to ascertain, whether the road would bear the inclemencies of winter. It might be possible, that the road was in good order in the month of May, but was by no means in a fit condition to go through the winter.

Greaves, in support of the rule, submitted that the fact of the magistrates giving a certificate of the good state of repair in which the road was, sufficed to entitle the inhabitants to be discharged from the indictment preferred against them.

COLERIDGE, J., (after consulting with Mr. Robinson of the Crown-Office).—In two other cases during the present Term, I have already decided that such a rule as the present, under such circumstances, cannot be made absolute. At sessions the practice is, not to discharge the inhabitants from the indictment, until the road has undergone a winter's wear after the repairs made. This, the officer informs me is the practice in this Court, where the indictment has been removed by certiorari. Although a certificate of repair has been given by the magistrates,

that may mean that the road was then in repair, and likely to continue so during the summer only. The present rule must therefore be discharged.

Rule discharged.

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WARD v. GREGG.

G. T. WHITE moved for a rule to shew cause why the attorney of the plaintiff in this case should not pay the costs of taxation, more than one-sixth having been taxed off by the Master. The facts on which he founded his application were these:—The writ issued in the case had been endorsed, according to the 2 Reg. Gen. H. T. 2 Will. 4 (a), and 5 Reg. Gen. M. T. 3 Will. 4 (b), with the plaintiff's claim for debt and costs. The former was stated to be 5*l.* 7*s.* 8*d.*, and the latter 2*l.* 2*s.* Within the four days prescribed by the rule the defendant's attorney paid both sums to the plaintiff's attorney, as well as a sum of 5*s.*, which the latter demanded. A receipt for both sums was given, and an order afterwards obtained to tax the claim. On taxation, the Master took off ten shillings. The object of the present application was, that as more than a sixth had been taken off the bill, the attorney should be compelled to pay the costs of taxation, pursuant to the rule of court. If the five shillings were reckoned as part of the claim, more than a sixth had been taken off. If it were not considered as part of the bill, then one-sixth had not been taken off. It ought, however, to be considered as part of the bill. Under the latter clause in the rule, therefore, the payment having been made within four days from the service, the defendant was entitled to the costs of taxation.

When a writ was endorsed pursuant to 2 Reg. Gen. H. T. 2 Will. 4, with a certain amount of debt and costs, and that amount, together with 5*s.* more, was paid within the four days prescribed by the rule, and more than one-sixth of the costs, including the 5*s.*, was disallowed on taxation:—
Held, not within the rule, and therefore the defendant was not entitled to the costs of taxation under it.

COLERIDGE, J.—There was no necessity to pay the five shillings, for the plaintiff would have proceeded at his

(a) Ante, Vol. 1, p. 198.

(b) Ante, Vol. 1, p. 471.

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peril, after the payment of the debt and costs claimed by the indorsement on the process. I think the meaning of the clause in the rule is merely, that the defendant may have the costs taxed notwithstanding such payment. That of course means the costs indorsed on the writ. This, therefore, does not seem to me a case within the meaning of the rule ; and it was the defendant's own fault in paying it, as there was no necessity for his so doing. I do not say that the defendant may not have redress in some other way.

G. T. White submitted that, although it might not be within the exact letter of the rule, the case must be considered within its spirit.

COLERIDGE, J.—It appears to me, that it is not a case within the rule, and I am not aware of any power which the Court possesses to extend it.

Rule refused.

COURT OF EXCHEQUER.

Trinity Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

PRICHARD v. MACGILL.

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DEBT for horse meat, the use and hire of horses, goods sold, and money due on an account stated. Plea, *nunquam indebitatus*. The case was tried before the undersheriff of Middlesex, when a verdict was found for the plaintiff for 1*l.* 15*s.* *Thomas* having obtained a rule to enter a suggestion to deprive the plaintiff of costs under the 23 Geo. 2, c. 33, (The Middlesex County Court Act)—

It is not necessary, in order to give a county court jurisdiction, that the *plaintiff* should reside within the county.

Ogle shewed cause.—The affidavit upon which the rule was obtained does not state that the plaintiff resides within the jurisdiction of the County Court. That is necessary, to bring the case within the act. The first section of the act enables the suitors of the Court to proceed in a summary way where the debt or damages shall not amount to 40*s.*, and to examine the plaintiff or defendant upon oath. By the fourth section no person is liable to be summoned to the Court, except such as were liable to be summoned before the act was made, and the Court is not to determine any cause other than such as might have been held by *plaint* before the making of the act. The sixth section enables the county clerk to issue a precept which shall have the same effect as a writ of *fiery facias* in the superior courts. It clearly appears, from these sections, that the Court has no jurisdiction, unless the plaintiff

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also resides within the county. The case which decided that the defendant must reside within the county is of recent date; *Tubb v. Woodward* (a). [*Alderson*, B.—Unless the defendant reside within the county the plaintiff cannot bring him before the Court at all, but there is a distinction between a jurisdiction *in invitum* and a jurisdiction over a person who comes to ask for it.] There is no authority to be found which decides that it is not necessary that the plaintiff should reside within the county, and it would seem from the cases respecting defendants, that it is necessary; *Webb v. Brown* (b), and *Dillamore v. Capon* (c). There was another objection, arising upon the nineteenth section, which deprives the plaintiff of costs, and gives the defendant double costs in cases within the act, unless the judge should certify that the freehold or title to land, or that an act of bankruptcy, principally came in question. It had been decided that the sheriff who tries a cause under a writ of trial was not a judge within that act. [*Parke*, B.—If this case is of that description, you ought to have shewn that cause before the judge who granted the writ of trial.]

Thomas, in support of the rule, was stopped by the Court.

PARKE, B.—I am clearly of opinion it was never intended the plaintiff should reside within the limits of the county to give the Court jurisdiction. All the books say is, that the cause of action must arise, and the defendant reside, within the jurisdiction of the Court. At common law this was a matter which could be tried at the County Court, and the 23 Geo. 2 does not impose the necessity of the plaintiff residing there, but merely gives the Court

(a) 6 T. R. 175.

(b) 5 T. R. 535.

(c) 1 Bing. 338; S. C., 8 Moore, 429.

a power of examining either party by a process which does not extend beyond the limits of the Court. That provision does not make it necessary that the plaintiff should reside within the jurisdiction of the Court. This opinion is confirmed by the 19th section, relating to costs, which merely requires that the defendant shall reside in the county. With respect to the other objection, the case of *Jones v. Bond* (a) is decisive.

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ALDERSON, B.—You cannot read the 19th section without perceiving that it is the defendant alone who is required to reside within the jurisdiction of the Court.

Rule absolute.

(a) Ante, p. 455.

ALDRIDGE v. BULLER.

PRICE moved to set aside a writ of habeas corpus to bring up the plaintiff in order to charge him in execution, on the ground, that the defendant was an outlaw. It appeared that the outlawry had taken place in May, 1836, and, in February, 1837, the defendant obtained judgment against the plaintiff as in case of a nonsuit, and for the costs upon that judgment, he now sought to charge the plaintiff in execution. The writ of habeas corpus had issued in March last.

In May, 1836, the defendant was outlawed, and, in the February following, obtained judgment as in case of a nonsuit. In March, he obtained a writ of habeas to charge the plaintiff in execution for the costs of that judgment; and the present rule was moved on the 29th April: —*Held*, that the outlawry was a sufficient ground for setting aside the writ, and that the application was not too late.

J. W. Smith shewed cause.—The application is too late. Judgment was obtained in February, and the present rule was not moved for until the 29th of April, the writ of habeas having issued in March.

Lord ABINGER, C. B.—The habeas corpus is a process to enforce the claim of the defendant. The plaintiff must

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either go to prison or pay the money. If an outlaw bring an action, his outlawry may be pleaded in bar; and Mr. *Price's* argument is, that the objection could not be taken in any other form but this.

J. W. Smith.—Secondly, this is not a ground on which the Court will set aside a writ of habeas corpus. The rule of law which prevents a plaintiff who has suffered outlawry from appearing in court, has not been held to extend to a defendant. [*Parke, B.*—In enforcing his claim for costs, is he not acting as a plaintiff? Lord *Abinger, C. B.*—Suppose he had brought his action on the judgment?] In that case the plaintiff must have pleaded the outlawry in abatement, and then he would have been obliged to have pleaded within four days. [*Parke, B.*—If forfeited to the crown it might be pleaded in bar.] In the present case the judgment was subsequent to the outlawry, and could therefore only be pleaded in abatement. In *Viner's Abridgement (a)*, it is stated, that a demand not ascertained at the time of the outlawry is not forfeited to the crown. And the same has been held in *Clarke v. Scroggs (b)*, and in an *Anonymous case* in *Salkeld (c)*. As there is a remedy by *audita querela*, the Court will not exercise its equitable jurisdiction upon motion; *Symons v. Blake (d)*. [*Parke, B.*—There could not be an *audita querela*; the form of the writ is *audita querela defentis.*]

Lord ABINGER, C. B.—The principle is clear—nothing more so. This is a process by which the defendant seeks to obtain a remedy upon his judgment. He might have had an action upon the judgment, but, as the party is in custody, he obtains a writ of habeas to charge him in exe-

(a) Tit. Outlawry, C.

(b) 2 Lutw. 1510.

(c) Salk. 275.

(d) 2 C. M. & R. 416.

cution. He is thus making use of the authority and process of a court of justice, in order to enforce his claim. This an outlaw cannot do, and unless the outlawry is reversed, it is clear we ought not to assist him.

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PARKE, B.—At first I doubted whether the application was in sufficient time, but I think any time before the judgment is acted upon is sufficient.

Rule absolute.

FIELD v. SMITH the younger.

ON the 18th of January a writ of fieri facias issued, directed to the sheriff of Shropshire, under which he levied on the 27th of January. On the 21st of February the sheriff was ordered to return the writ, and on the 1st of March he returned that he had levied of the goods and chattels of the defendant 14*l.* 0*s.* 7*d.* A rule having been obtained by *Hance*, calling on the sheriff to pay to the plaintiff the amount levied,

Where the sheriff, after levy, received notice that the defendant had petitioned for his discharge under the Insolvent Debtors' Act, and being subsequently ordered to return the writ, returned that he had levied to a certain amount:—*Held*, that he was concluded by this return, and that the defendant's discharge was no answer to a rule calling on him to pay over to the plaintiff the amount levied, he having neglected to use due diligence in inquiring as to the defendant's discharge.

W. H. Watson shewed cause.—On the 4th of February the sheriff received notice that the defendant had petitioned for his discharge under the Insolvent Debtors' Act on the 25th of November previously, and upon the 8th of April the defendant was discharged. At the time, therefore, that the sheriff made his return, the defendant had a defeasible title to the goods, which was defeated by his subsequent discharge. Where a sheriff has returned fieri feci, and the defendant afterwards becomes bankrupt, the sheriff is not bound to pay over the money; *Brydges v. Walford* (a), *Clutterbuck v. Jones* (b). [Parke, B.—The sheriff might have ascertained, by inquiring at the Insolvent Court, that the defendant had assigned his effects to

(a) 6 M. & S. 42.

(b) 15 East, 78.

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the provisional assignee.] That assignment is upon condition, and unless the property remains in the assignee it is only a defeasible title, which would have become absolute, if the Court had refused his discharge. It would be a great hardship, if this rule were made absolute, since the sheriff would be bound to pay the money to the plaintiff, and also to the assignees.

Hance, in support of the rule.—The sheriff is concluded by the return. It appears from his own affidavit, that at the time he levied, notice was given him that the defendant had petitioned the Insolvent Court for his discharge. He ought, therefore, to have applied to the Court to enlarge the time for making the return. As the sheriff has been guilty of negligence, the Court will not relieve him.

PARKE, B.—If the sheriff had used due diligence, the Court would have been inclined to assist him; but his present situation arises entirely from his own laches. The cases cited are distinguishable from this, for there, the sheriff had used due diligence, and made the only return which he was able. In the present case, he must be bound by his return, and pay over the money. He had an opportunity of relieving himself by searching the Insolvent Court; but having neglected to do so, he must be concluded by his return.

Rule absolute, without costs.

SMITH v. BROWN.

No judgment
can be given for
either party
where an action

CASE.—The declaration alleged that the defendant was a carrier from Birmingham to Bristol, and that the plaintiff for a tort has been tried before the sheriff under the Writ of Trial Act.

In an action against a carrier for negligence, the declaration stated the contract to be to carry goods from Birmingham to Bristol, and to deliver them to the plaintiff at Bristol. The defendant pleaded the general issue, and that, though the goods were delivered to the defendant to be carried from Birmingham to Bristol, yet they were not delivered to the defendant to be delivered to the plaintiff at Bristol. The jury found for the plaintiff on the general issue, with damages, and for the defendant on the other plea. *Semble*, on this finding the defendant is entitled to the *postea*.

tiff had delivered certain casks to the defendant at Birmingham, to be by him carried and conveyed from Birmingham aforesaid to Bristol aforesaid, and there delivered to the plaintiff, for certain hire and reward therefor payable to the defendant in that behalf. It then assigned as a breach, that although the time for the delivery of the said casks had long since elapsed, yet the defendant so carelessly behaved and conducted himself in that behalf, that by and through his carelessness, negligence, and improper conduct, the said casks were not delivered to the plaintiff at Bristol or elsewhere. Pleas—first, not guilty; secondly, that, although true it is that the said casks were delivered to the defendant, being such carrier, to be by him conveyed from Birmingham to Bristol, yet that the same were not delivered to the defendant to be delivered to the plaintiff at Bristol modo et forma. The cause was tried by consent before the under-sheriff of Bristol, when the jury found a verdict for the plaintiff on the first issue, with 12*l.* 7*s.* 5*d.* damages, and for the defendant on the second issue. The under-sheriff delivered the postea to the plaintiff, who signed judgment for the damages.

Addison moved for a rule to shew cause why the judgment should not be set aside for irregularity, with costs, and why the Master should not deliver the postea to the defendant. [*Parke*, B.—The defendant is entitled to the postea and judgment: all that the plaintiff is entitled to is the costs of the issue found for him.]

Ball shewed cause, and objected that the Court had no power to order the postea to be delivered to the defendant, as the cause was tried coram non judice. The 3 & 4 Will. 4, c. 42, (the Writ of Trial Act), did not apply to a case like the present, but only to debts and pecuniary demands: *Watson v. Abbott* (a).

(a) Ante, Vol. 2, p. 215.

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Addison, in support of the rule.—Upon the whole record, the defendant is entitled to the postea: *Vivian v. Blake (a)*. Then, as to the objection, that the sheriff had no authority to try the cause, it was now too late to take advantage of it, as the cause was tried on the 17th of April last.

LORD ABINGER, C. B.—As the record now stands, the defendant might have a writ of error. In point of fact, neither party is in a situation to sign judgment: it is an informal record, and no judgment can be given. The sheriff had no power to try this particular case; the act of Parliament does not extend to it. The judgment is a perfect nullity, but I see no reason for encouraging a writ of error by delivering the postea to the defendant. The rule must be absolute for setting aside the judgment, and discharged as to the other part.

Rule accordingly.

(a) 11 East, 263.

DAWES v. ANSTRUTHER.

In an action by indorsee against acceptor of two bills of exchange for 500*l.* each, the declaration contained two counts on the bills only. The particulars of demand stated the action to be brought to recover 500*l.*, the amount of the

THIS was an action on two bills of exchange for 250*l.* each, drawn by W. Gordon upon and accepted by the defendant, and indorsed by Gordon to the plaintiff. The declaration contained but two counts, one on each bill. The particulars of demand were as follow:—

“ This action is brought to recover the sum of 500*l.* due from the defendant to the plaintiff upon the several bills of exchange set forth in the first and last counts of the declaration, with interest thereon.”

The plaintiff had arrested the defendant for 240*l.* only, and the bills were given by the defendant to the drawer as a security for money paid by him for the defendant, and indorsed by the drawer to the plaintiff:—*Held*, that the defendant was entitled to farther and better particulars of the plaintiff's demand, *Alderson, B., dissentiente*.

A summons was taken out before *Gurney*, B., at chambers, for a further and better account in writing of the particulars of the plaintiff's demand, with dates, and the learned Judge made an order accordingly. *Ogle* having obtained a rule to rescind the order,

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Thesiger shewed cause, upon an affidavit, which stated that the plaintiff had arrested the defendant, and that the writ was indorsed for bail for 240*l.*, and there was a further indorsement that the plaintiff claimed 240*l.* 6*s.* 4*d.*, for debt, without interest, and 3*l.* 10*s.* for costs; it also stated that the bills were delivered to Gordon as a security for money to be paid by him for the defendant, and that the defendant did not know who the plaintiff was. The defendant had deposited money in lieu of bail. Under these circumstances, it was contended that the defendant was entitled to better particulars of the amount the plaintiff sought to recover. In *Brooks v. Farlar* (a), which was an application for better particulars, *Tindal*, C. J., in delivering judgment, says: "On a single count for a bill of exchange, the defendant is not entitled to any particulars unless he makes out a strong case of exception." The circumstances of this case are such as to entitle the defendant to call upon the plaintiff for better particulars. [*Alderson*, B.—You want a bill of discovery, and you had better go into a court of equity: it is not usual to require any more particulars in actions on bills of exchange than are here given.] The plaintiff arrests for 240*l.*, and then claims 500*l.*, so that it is impossible to know what he is going for. [*Alderson*, B.—The only question is, whether this is not a good particular in an action on a bill; I do not see what more particulars could be given: you may have an equitable right to inquire under what circumstances the bills were indorsed to the plaintiff, but that is the subject of a

(a) 3 Bing. N. C. 291; ante, p. 361.

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special application.] The Judge is to exercise his discretion under the particular circumstances of the case.

Ogle, contra.—The declaration only contains two counts on the bills, and the particulars state everything the defendant can require. A plaintiff is not confined to the sum indorsed upon the writ, but may claim at the trial the full amount of the two bills.

LORD ABINGER, C. B.—Suppose this had been an action by Gordon himself, and the defendant had made an application for further particulars, upon affidavit stating that the bills were given to Gordon under an agreement that he should pay some debt of the defendant's; if Gordon does not deny that the bills were merely a security for money paid, although, in point of law, in an action on the bills, he might sue for the whole amount, yet the defendant has a right to know what sum he really claims. *Ex concessis*, these bills were given, not for a debt, but as a security for money advanced. I should think this is a case in which better particulars of the plaintiff's demand ought to be given, it appearing that he is only entitled to 240*l*.

ALDERSON, B.—A bill of particulars is simply this: when the declaration is so general that you cannot upon the face of it ascertain what the plaintiff goes for, then the defendant has a right to call upon the plaintiff for a statement of his demand; but I have always understood, as long as I have been acquainted with the law, that where there is a special count, the defendant cannot require particulars, as the particular is the declaration itself. I find it so laid down in Tidd's Practice, and in all the books: there is no variation in the practice—particulars of the sum the plaintiff seeks to recover are never required in actions on bills of exchange. This may be a case in which the party may not be equitably entitled to recover the

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amount for which he goes, but that is no reason why he should be obliged to state in his particulars that he goes for 240*l.* only. It may be an unconscientious thing to demand this 500*l.*; but can any person doubt, if he sees a count upon one bill of exchange for 250*l.*, and another count upon another bill of exchange for 250*l.*, and a particular that the plaintiff goes for the amount of the bills in those counts, could any person doubt the distinctness of the demand?—whether conscientious or not, is another question. To require further particulars in a case like this, is to make use of particulars to stay proceedings until the plaintiff should limit his demand.

BOLLAND, B.—So far I agree with my Brother *Alderson*, that there must be some clear and specific grounds for asking for better particulars in actions on bills of exchange than are here given, and I am not aware, except in one instance, that I ever made such an order. But, in the present case, if the application had been made to me, I should have called upon the plaintiff to square his demand by what he originally indorsed upon the writ, viz., 240*l.* and upwards. If the holder of these bills had a claim for 500*l.*, it is extraordinary that he should moderate his claim to 240*l.* The presumption is, that an indorsee would claim the whole amount which he could prove at the trial. The ground upon which I agree with the Lord Chief Baron is this, that the plaintiff has confined himself to a claim of 240*l.* by arresting for that amount only; if he had not done so, the defendant would have been left to a court of equity and a bill of discovery. It is clear Gordon had the bills put into his hands as a security; and I think, under the circumstances, that the plaintiff is bound to give particulars of the sum he claims.

GURNEY, B.—I never in any other case made an order for better particulars in an action on a bill of exchange;

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but, under the circumstances, I think it was not unreasonable to call upon the plaintiff to state more.

Lord ABINGER, C. B.—I am not aware that we may not do justice in this Court in a summary way, instead of compelling the party to resort to a bill of discovery.

Rule discharged.

ASHBY v. HARRIES.

A declaration on the 28 Eliz. c. 4, stated that the sheriff took "more and other consideration than is by the statute limited and appointed in that behalf; that is to say, divers large sums of money, in the whole amounting to the sum of 1*l.* 16*s.* 2*d.*, more than is in the said act limited and appointed in that behalf:—*Held* bad on special demurrer.

THIS was an action on the 28 Eliz. c. 4, against the Sheriff of Northamptonshire, for extortion. The declaration (which was in the usual form) stated a judgment against the plaintiff for 54*l.* 9*s.* 2*d.*; that a writ issued, directed to the defendant, and indorsed to levy 22*l.* 9*s.* 6*d.* besides sheriffs' poundage, &c.; that the defendant, by virtue of the writ, seized and took in execution divers goods and chattels of the plaintiff of the value of the monies indorsed upon the writ: yet, the defendant, neglecting his duty as such sheriff, wrongfully and illegally received and took of and from the plaintiff for the serving and executing the said execution more and other consideration and recompence than is by the statute limited and appointed in that behalf, that is to say, *divers large sums of money, in the whole amounting to the sum of 1*l.* 16*s.* 2*d.* more than is in the said act limited and appointed in that behalf*, contrary to the form of the statute, whereby the plaintiff is damaged and grieved &c.

Special demurrer, assigning for cause that the declaration does not state how much the defendant received and took from the plaintiff for serving the said writ of execution, but only that he took 1*l.* 16*s.* 2*d.* more than is in the act limited, and that defendant cannot take issue on that allegation without admitting that the sum mentioned is more than is by law allowed.

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Peacock, in support of the demurrer.—The declaration is defective, inasmuch as it mixes the law and fact. It should state how much the defendant took, or that he took more than a shilling in the pound upon the sum levied. In Comyn's Digest, title Pleader, (E. 34), it is said that every plea ought to be triable, and therefore must consist of matter of law, which is determinable by the Court—or matter of record, which is triable by the record—or matter of fact, which is triable by the country: and if fact is complicated with matter of law, so that it cannot be tried by the Court or jury, the plea is bad; as if the defendant pleads that *A. licite gavisus fuit bona felon*, it will be bad, for the jury cannot determine whether he lawfully enjoyed, nor the Court whether he enjoyed. So if the condition of a bond be, that he will shew a sufficient discharge of an annuity, it is bad if he pleads that he shewed a sufficient discharge, for the jury cannot try whether it is sufficient; but he ought to shew what discharge he gave, and the Court will judge whether it be sufficient. If a plea of the Statute of Limitations should state that the cause of action did not accrue within the time limited by law, that would be bad, for the fact and law would both be submitted to the jury. Where there is a difficulty in the construction of an act of Parliament, as in the case of *Paget v. Foley* (a), which arose on the 3 & 4 Will. 4, c. 42, s. 3, this method of pleading would be productive of the greatest inconvenience; it would be necessary to incur the expense of a trial to ascertain the fact, and then to go to the Court for its decision as to the law. It appears from the case of *Lyster v. Bromley* (b), that there was formerly difficulty in the construction of the 28 Eliz. c. 4. [*Parke, B.*—It may be questionable whether the sheriff can levy for the expenses of his poundage].

(a) 2 Bing. N. C. 679.

(b) Cro. Car. 286.

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Humfrey, in support of the declaration, stated it to be in the form always used, and referred to *Ramsey v. Tufnell* (a); but, upon the suggestion of the Court, consented to amend.

Amendment on payment of costs.

(a) 2 Bing. 255.

TINLEY v. PORTER.

In order to obtain an attachment for not obeying a subpoena ad testificandum, the affidavit must state the party to be a material witness.

A RULE having been obtained by *Cresswell* for an attachment against a person of the name of Askew, for not obeying a subpoena ad testificandum,

R. Alexander shewed cause, and objected, that the affidavit on which the rule was obtained did not state that Askew was a material witness. He referred to *Taylor v. Willans* (a).

Cresswell, in support of the rule, urged that there was nothing to shew, that the plaintiff did not bonâ fide intend to make use of his evidence.

LORD ABINGER, C. B.—Where the party has another remedy, he ought to shew in his affidavit that the person against whom he seeks to obtain an attachment was a material witness in the cause.

PARKE, B.—We are bound by the decision of the Court of Common Pleas: it appears to be a new practice, but as it has been so decided, we must respect that authority.

Rule discharged.

(a) 4 M. & P. 59.

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In re ROBERT THOMPSON.

A BILL was filed in the Court of Chancery against Mr. Thompson and other persons, as executors and trustees under the will of a deceased party. Mr. Thompson, who was one of the side clerks in the King's Remembrancer's Office, sued out a writ of privilege, and served a copy on the plaintiff.

An officer of this Court being sued in the Court of Chancery as executor with others, served the plaintiff with a writ of privilege; and on application to set aside the writ, the Court refused, on the ground that the writ did not operate as an injunction, or supersede the necessity of pleading the privilege.

Simpkinson moved the Court to set aside the writ.—It is doubtful whether the privilege of an officer of this Court is available against a proceeding in the Court of Chancery. In Viner's Abridgment, title Privilege, 524, p. 26, it is said, "The Lord Chancellor *Egerton* declared that no *chequer* man is privileged against a subpoena of this court; and several pleas by officers there, as register, receiver, &c., have been overruled. But, at all events, the writ only applies to cases where the officer is sued alone, and in his individual capacity. In *Fanshaw v. Fanshaw* (a), two of the defendants, being officers of the Exchequer, plead the privilege of the Exchequer. Plea over-ruled, because there was a third defendant, who had no right of privilege. *Powle's case* (b), *Molyn v. Cook* (c), *Townsend v. Duppa* (d) *Pratt v. Salt* (e), *Robarts v. Mason* (f), *Ramsbottom v. Harcourt* (g), all establish that the privilege cannot be made use of where the party claiming it is sued jointly with other persons. If the law were not so, this inconsistency would follow—that if the other party happened to be an officer of the Court of Chancery, there would be no means of suing at all. Farther, to entitle a party to this privilege, he must be sued in his personal and not in

(a) 1 Vernon, 246.

(b) Dyer, 377.

(c) Vent. 298.

(d) Str. 610.

(e) Cited Bac. Ab. tit. Priv. 533.

(f) 1 Taunt. 254.

(g) 4 M. & S. 585.

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his representative character. Another objection to the writ is, that the bill was filed, and the subpoena served, when the Court of Exchequer was not sitting. The form of the writ of privilege is, that the officers of the Exchequer are not to be impleaded in any other court "so long as the said Court of Exchequer shall be open (a)."

Charles Purton Cooper, contra.—Though the Courts may not be disposed to favour a privilege, now the reason for establishing it has passed away, yet, if it is no longer useful, or even injurious, it is for the Legislature, and not the Court, to interfere. It is true, that, in certain cases, the privilege has not been allowed, where the party claiming it has been sued jointly with others not privileged; but it will be found that, in all those cases, the reason for disallowing the privilege was, that the party could not have the same remedy in the Court where the privilege was claimed. In the Court of Chancery, though there is both an equity and a common-law jurisdiction, yet, if the case required the decision of a jury, the party could not have the complete remedy he desired. Chief Baron *Gilbert*, in his treatise on Civil Actions in the Common Pleas (b), after stating that the particular privilege of the officers of each Court is not to be impleaded elsewhere, goes on to say, "But this is to be understood when the plaintiff can have the same remedy against the officer in his own court as in that where he sues him, for if money be attached in an attorney's hands by foreign attachment in the Sheriff's Court in London, he shall not have his privilege, because in this case, the plaintiff would be remediless; for the foreign attachment is by particular custom of London, and does not lie at common law; so that, if an attorney should have his privilege, the plaintiff should be without his re-

(a) See a form of the writ in *quer Office of Pleas*, p. 51.
Burton's Practice in the Exche- (b) p. 809.

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dress. So, if a writ of entry or other real action be brought against an attorney of the King's Bench, he cannot plead his privilege, because if this should be allowed, the plaintiff would have a right without remedy, for the King's Bench hath not cognizance of real actions. So, if an attorney of the Common Pleas be sued in an appeal, he shall not have his privilege, for his own Court hath not cognizance of this action, and by this protection he should go unpunished." In the Court of Exchequer no case could arise in which the party against whom the privilege is set up would not have an equal remedy as in any other Court either of law or equity. Numerous instances are collected in Burton's Practice in the Exchequer Office of Pleas (a), where the privilege has been allowed though the party claiming it has been joined with others. "In the 11 Prac. 2, Newport (servant of W. Ford one of the Barons), and Margaret his wife against Horseman, in debt pro. debo. prefat. Margarete dum sola fuit; Mich. 7 Hen. 5, Dixon, clerk of the pipe, and two others not having privilege, against Walter, the parson of St. Margaret Moises in London, in trespass."

But the plaintiff is premature in making this application. The writ is not addressed to the plaintiff, but to the Lord Chancellor, and without Mr. Thompson should take the further proceeding of pleading the privilege the writ is a mere nullity. Supposing Mr. Thompson had been arrested, the sheriff would not be justified in discharging him upon the mere production of this writ; *Crossley v. Shaw* (b). Until the privilege is pleaded, the question as to how far he is entitled to avail himself of it cannot arise: *Snee v. Humphreys* (c). The only effect of the suing out the writ, is to give notice that he is an officer of the Court of Exchequer, and enjoying the privilege. There is a

(a) Vol. 1, p. 45, 48.

(b) 2 W. Blac. 1085.

(c) 1 Wils. 306.

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distinction between the writ of privilege and an injunction of privilege.

Simpkinson, in reply, contended that writ operated as an injunction of privilege.

LORD ABINGER, C. B.—I am of opinion that there is no ground for the application. This writ is not an injunction, but is nothing more than a testification under the authority of the Court, that the party has a general privilege. And it is a mistake to suppose this document can be used for the purpose of intimidation in the present case. The suing out the writ of privilege does not do away with the necessity of pleading the privilege, but it is only evidence in support of the plea. We are asked to set aside the writ, because the privilege cannot apply to this particular case; but why set it aside because the party tries to make that use of it which the law does not permit? As the attempt has been made to use the writ for the purpose of deceiving the plaintiff, the application will be discharged without costs.

Application discharged, without costs.

GILBERT, Executor, v. PLATT.

In an action by an executor on a promissory note, the declaration alleged a promise to the plaintiff after the death of his testator:—*Held*, that non assumpsit was a good plea.

ASSUMPSIT on a promissory note made by the defendant, payable to the order of the plaintiff's testator. The declaration, after stating the making of the note in the usual form, alleged a promise to the plaintiff as executor after the death of his testator. The defendant pleaded that he did not promise modo et formâ. To this plea there was a general demurrer.

R. V. Richards, in support of the demurrer.—This plea is forbidden by R. H. T. 4 Will. 4 (a), which directs that

(a) Ante, Vol. 2, p. 322.

in all actions on bills of exchange and promissory notes the plea of non assumpsit shall be inadmissible. [*Parke, B.*—The effect of this plea is to admit there was such a note, and to deny the promise to the plaintiff as executor: in no other way could he raise the question, as to whether you mean to take the case out of the Statute of Limitations.] The promise to the executor is raised by inference of law: supposing this to be an action on the note, the plea of non assumpsit is inadmissible. [*Parke, B.*—It is not an action on the note in the sense used in the rule, but an action on the subsequent promise.] If at the trial the probate were put in, and the plaintiff proved the note in favour of the testator, the law would imply a promise to pay the executor. [*Parke, B.*—The law does not imply a promise to the executor, for, in that case, the Statute of Limitations would run from the death of the testator.] There can be no such promise as that laid to pay the note, unless the note existed as a note, and then it necessarily follows that this is an action upon the note. [*Alderson, B.*—The action is not upon the promise contained in the note, and that is the meaning of the rule. But, assuming this to be an action on the note, the rule says that the plea must traverse some matter of fact, and that is done here by denying the promise to the executor: the rule is clear enough if taken altogether; it means that the implied promise cannot be traversed. Here it will be necessary to shew, as a matter of fact, a promise to the executor, and that may no doubt be traversed, not being a promise contained in the note itself. *Parke, B.*—The rule is confined to actions upon the note itself, that is, where the sole cause of action is the making of the note. This declaration is not maintainable without proving an express promise to the plaintiff.] Suppose a declaration on a note were so framed as to make the date of the note material, and it appeared on the face of the declaration that the debt was barred by the statute, could non assumpsit be pleaded?

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[*Parke, B.*—If the plaintiff shewed the debt to be barred, and alleged a promise to pay, I am not sure non assumpsit might not be pleaded.] The plea does not confess or avoid the matters stated in the declaration. [*Parke, B.*—The declaration contains two material allegations, the making the note, and after the death of the testator a promise to pay: the plea denies a material allegation.]

Richards then prayed leave to amend on payment of costs, which was granted.

Amendment on payment of costs.

Ex parte PERING.

A petition of right was addressed to the King "in his Court of Exchequer;" the King indorsed it "soit droit fait;"—*Held*, that this Court had no jurisdiction to adjudicate upon it.

Where a petition of right is indorsed generally, it goes to the Court of Chancery; and in order to give the other courts jurisdiction, there must be a special indorsement, commanding right to be done in the particular court.

THIS was a petition of right, presented by Mr. Pering to obtain compensation for the use of his patent for the improvement of anchors. Mr. Pering had held the offices of steward and clerk of the dock-yard at Plymouth from the year 1782 to 1822, when he was allowed to retire upon a pension of 450*l.* per annum. During that period, he had made several suggestions of improvements in the construction of ships, and in the year 1830, having invented an additional improvement in the formation of anchors, obtained a patent containing a proviso for making the same void, if he, his executors, administrators, and assigns should not supply or cause to be supplied for his Majesty's service all such articles of the said invention as he or they should be required to supply in such manner and at such times, and at and upon such reasonable prices and terms as should be settled for that purpose by the commissioners for executing the office of Lord High Admiral. Subsequently Mr. Pering, at the request of the Commissioners of the Navy, drew up instructions for the guidance of smiths at the dock-yards in making the improved anchor,

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and on that occasion he was occupied three months, and incurred considerable expense in superintending the construction of the anchor and in journeying to and from Plymouth, but had neither received his expenses or any remuneration. Applications had been made to the Board of Admiralty, and to the First Lord of the Admiralty, but without effect. Mr. Pering thereupon applied to the Court of King's Bench for a mandamus to the Lords of the Admiralty, commanding them to fix a reasonable price to be paid to him for the use of his patent, but the Court refused to grant a rule (a). The present petition was then presented, addressed to the King *in his Court of Exchequer*, and after stating the facts, prayed that the King would be graciously pleased to order that right be done (b). The King indorsed the petition "soit droit fait." There was a further indorsement by the Secretary of State for the Home Department, referring the petition to the Attorney-General.

The Attorney-General appeared, and objected that the Court had no jurisdiction. The indorsement referred the petition to the King's attorney, who is either to confess or deny the facts stated in it: upon his denying them, an inquisition issued to ascertain whether they are true or false. [*Alderson, B.*—In Comyn's Digest it is stated (c) that "upon petition out of Parliament, or there, if it be not pursued as a statute, it shall be indorsed by the King 'soit droit fait,' and then delivered to the Chancellor."] The course of proceeding is stated by Lord Keeper Somers in his argument in *The Bankers' Case* (d): he says "The manner of answering petitions to the person of the King was very various, which variety did sometimes arise from the conclusion of the party's petition, sometimes from the nature

(a) See *Ex parte Pering*, 6 N. Ryley's Placita Parliamentaria.
& M. 472. (c) Tit. Prerogative (D. 80.)

(b) See forms of petition in (d) Ed. 1733, p. 40, 41.

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of the thing, and sometimes from favour to the person, and according as the indorsement was, the party was sent into Chancery or the other courts. If the indorsement was general, 'soit droit fait al partie,' it must be delivered to the Chancellor of England, and then a commission is to go to find the right of the party, and ~~that~~ being found, so that there was a record for him, thus warranted, he is let in to interplead with the King. But if the indorsement was special, then the proceeding was to be according to the indorsement in any other Court. This is fully explained by Stamford, in his Treatise of the Prerog. cap. 22."

THE COURT then called upon

W. H. Watson in support of the petition.—A petition of right will lie to any of the Courts at Westminster. [Lord *Abinger*, C. B.—The King may refer it to any of the Courts; for instance, upon a question touching real property, he may refer it to the Common Pleas; upon a matter relating to the revenue, to this Court; or upon a point of criminal law, to the King's Bench.] This petition is presented to the King "*in his Court of Exchequer*" at Westminster. [Lord *Abinger*, C. B.—The presenting the petition to the King in his Court of Exchequer does not give the Court any jurisdiction.] The King says "let right be done." [Lord *Abinger*, C. B.—But as to the mode of doing it, he requires the advice of his Attorney-General. Where he says "let right be done," it means done in the Court of Chancery.] That is where the petition is general, and not to the King "*in his Court of Exchequer*." [Alderson, B.—The King does not say "let right be done" in his Court of Exchequer. Lord *Abinger*, C. B.—Suppose the Attorney-General should advise the King to refer to the Court of Chancery, how can we interfere? Unless the King specially indorse it to this Court, we have no jurisdiction in the matter.] This Court adjudicated upon the petition

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in *Sir Henry Nevil's case* (a). [Lord Abinger, C. B.— That was an exhibition to the Court of a deed of grant of the office of keeper of a park and of an annual rent charge, and the prayer was that the deed might be recorded.] Mr. Justice Blackstone says (b), “The common law methods of obtaining possession or restitution from the crown of either real or personal property are: 1. By *petition de droit*, or petition of right, which is said to owe its origin to King Edward the First. 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer. The former is of use when the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate: and then, upon this answer being endorsed or underwritten by the King *soit droit fait al partie* (let right be done to the party), a commission shall issue to inquire of the truth of this suggestion, after the return of which the King's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject.” In a note at the end of *Sir Henry Nevil's case* the learned reporter says, “From this record may be seen the order and form how one who has a rent out of land in the King's hands shall make his petition to the Court of Exchequer, to come at it without making petition to the King's person, and also how he shall have the judgment executed, for it is not the course to command by parol that payment be made, but a writ in the form aforesaid shall be awarded by the Barons.” In *Sir Thomas Wroth's case* (c), the Court of Exchequer gave judg-

(a) 1 Plow. 377.

(b) 3 Blac. Com. 255.

(c) 2 Plow. 452.

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ment upon a petition by Sir Thomas Wroth, to be paid the arrears of an annuity granted to him for his life, by King Henry VIII., by patent, for the exercise of the office of Usher of the Privy Chamber to Prince Edward his son. [*Bolland*, B.—That case was not a petition of right.] So in Manning's *Exchequer Practice* (a), it is said, "By the law of England no personal wrong can, for obvious reasons, be imputed to the sovereign. But when the property of the subject is invaded or withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. Where, however, a right is sought to be established against the crown itself, it would be absurd as well as indecent to adopt the mandatory forms of common process. The course therefore prescribed by the common law is to address a petition to the King *in one of his Courts of Record*, praying that the conflicting claims of the crown and the petitioner may be duly examined. As the prayer of this petition is grantable *ex debito justitiæ*, it is called a petition of right, and is in the nature of an action against the King." In the precedent in *Coke's Entries* (b), the petition is general. In *Viner's Abridgement*, title *Prerogative of the King* (c), it is stated that "the Justices of B. R. may proceed to the examination of the matter by themselves if the petition contains that the King commands them to examine it, and this without the original out of Chancery." In the present case the King's commands "that right should be done" according to the terms of the petition, which is in his Court of Exchequer.

Lord ABINGER, C. B.—If one single precedent had been cited to shew, that upon the general indorsement by the King, of "let right be done," the Court of Exchequer had proceeded to adjudicate upon the petition, I should have yielded; but though there must be numerous instances of petitions of this sort to be found, no autho-

(a) p. 84.

(b) p. 402.

(c) (Q. 13).

rity has been produced to warrant the present case. Unless the King specially refers the petition to the Court of Exchequer, we have no jurisdiction. The petition prays that his Majesty may be graciously pleased to order that right be done, and then there is a reference to the Attorney-General to advise the King as to the best mode of doing right. We do not know whether the Attorney-General may or may not advise the King to refer it to this Court, and until a further indorsement is made to give us authority, we ought not to exercise it. The ground of my opinion is, that it does not appear from the authorities cited that the Court has in this case any jurisdiction.

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BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—Chief Baron *Comyn* states the distinction, viz., if the petition have a special conclusion, that the King command his judges of a particular court, and if it be endorsed accordingly, it shall be pursued there. Here, the King has not referred the petition to this Court: as soon as he has, we shall obey.

— (11) *See Crawford v. Morrison. 7 C.B. 285.*

PLUMMER, Administratrix of THOMPSON, Deceased, v.

Reported 2 LEE. 495.

DEBT on an award.—The declaration stated that before the making of the submission to arbitration thereafter the plaintiff, as administratrix, and the defendant, concerning divers sums of money, of part of which there had been a settlement on a day certain in the lifetime of the intestate, to wit, on &c.: it then stated the submission to arbitration, and that the arbitrator awarded that there was due from the defendant to the plaintiff, as administratrix, 150*l.*, together with interest on the same *from the period of the last-mentioned settlement.* The defendant pleaded, first, that the arbitrator did not make any award; secondly, that the day in the declaration mentioned was not the day of the last settlement; and, thirdly, that no settlement was made. The first and third issues were found for the plaintiff, and the second for the defendant:—*Held*, that the second issue was immaterial. *Held*, also, that the award was final; it appearing that the date of the last settlement was certain, and not a matter in dispute.

The declaration stated that differences were pending between

A judgment non obstante veredicto proceeds on the confession in the plea, and the insufficiency of the avoidance; therefore, where a plea raises an immaterial issue, but contains no confession of the cause of action, the proper course is to award a replader, and not to give judgment non obstante veredicto.

A replader cannot be granted as to part of a cause of action.

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next mentioned, certain differences had arisen and were depending between the plaintiff as administratrix as aforesaid and the defendant, concerning divers sums of money due from the defendant to the plaintiff as administratrix as aforesaid, and of and concerning part of which sums of money there had been a settlement on a certain day in the lifetime of the said Thompson, to wit, on the 12th day of July, 1833, which settlement was the last settlement next before the making of the award thereafter mentioned: and, therefore, for putting an end to the said differences, the plaintiff, as executrix as aforesaid, and the defendant, theretofore, to wit, on the 11th June, 1835, respectively submitted themselves to the award of one J. P. to be made between them of and concerning the said differences: and the plaintiff in fact saith that the said J. P. having notice thereof, and having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on the 13th May, 1836, made his certain award between the plaintiff as administratrix as aforesaid and the defendant, and thereby awarded that there was then due from the defendant to the plaintiff, as administratrix as aforesaid, the sum of 150*l.*, together with interest on the same from the period of the said last-mentioned settlement, on payment of which a receipt in full should be given, of which said award the defendant afterwards, to wit, on &c., had notice. Averment—That although the plaintiff, as administratrix as aforesaid, had always been willing to receive the monies so awarded, and on payment thereof to give a receipt in full, the defendant had not paid the same or any part thereof.

Pleas—first, that the arbitrator did not make any award of and upon the premises in the declaration mentioned in manner and form, &c.; secondly, that the day in the declaration in that behalf mentioned was not the day of the last settlement next before the making of the said award in manner and form, &c.; thirdly, that no such settlement as in the declaration mentioned was at any time made: on which, issues were joined.

At the trial before *Alderson*, B., at the Middlesex Sit-
tings in Hilary Term, the plaintiff had a verdict on the
first and third issues, and the defendant on the second.

W. H. Watson, on behalf of the plaintiff, obtained a
rule to shew cause why judgment should not be entered
non obstante veredicto on the second issue, on the ground
that it was immaterial; and *R. V. Richards* obtained a rule
nisi for a new trial, on the ground that the award was un-
certain, inasmuch as it did not find the day of the "last
settlement."

R. V. Richards, for the defendant.—The award is uncer-
tain upon the face of it. It awards that there is due from
the defendant to the plaintiff a certain sum, with interest
on the same from the period of the last settlement, but it
leaves the precise time of the last settlement wholly unde-
fined, and consequently the defendant is unable to calcu-
late the amount of interest which he is to pay. Without
the averment in the declaration that there was a settle-
ment on a particular day, how could the defendant know
the time of the last settlement? and unless that time is
ascertained, the defendant cannot pay money into Court.
The time is a fact which is known to the arbitrator alone,
and it is no answer to say that he could have been called
to prove it, as he might have died before the trial. An
award must be certain in its terms, without the aid of ex-
trinsic matter to explain it: *Cargey v. Aitcheson* (a). The
averment of time is a material allegation, though laid under
a videlicet.

W. H. Watson, for the plaintiff.—The date or time of
the last settlement is not material. If money be payable
on a certain event, it is not necessary in pleading to aver
the precise day on which such event happened, and if the

(a) 2 B. & C. 170.

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day be improperly made parcel of the issue, it is immaterial: *Bennett v. Holbech* (a). [Alderson, B.—As to the objection that the defendant could not pay money into Court, he might have demanded a particular.] Then the award is sufficiently certain in terms. In *Beale v. Beale* (b), it is said, “ Si un submission soit de tout controversies touchant un voiage al mere, et un obligation oue condition pur performance de ceo; et un agard est fait que l’un paiera son parte del charge del voiage, et allowera son proportionable parte del losse que venera all niege per le voiage sur account, et agard oustre de l’auter parte &c. Coment que cest agard soit de luy mesme uncerten, ancore en tant que poet estre reduce al un certentié, ceo est un bon agard.” So here the award may be rendered certain. If the award had directed the party to pay interest from the death of A. B., the time of his death might be shewn by evidence. Besides, if the date may or may not be certain, the objection should have been pleaded: *Cargey v. Aitcheson*, *Hanson v. Liversedge* (c.)

R. V. Richards.—If all matters in difference are not legally determined upon, the defendant may raise the objection under the traverse of the award having been made modo et forma. The case put of an award for payment of interest from the death of an individual, would be bad by reason of uncertainty. So here, it is impossible to say what was passing in the arbitrator’s mind as to the last settlement. He alone could have explained his own meaning, so that the defendant would have to substitute one mode of controversy for another. It might be different if the arbitrator had referred to a fact which could be ascertained with certainty aliunde.

Cur. adv. vult.

(a) 2 Saund. 317.

(b) Roll. Abr. Arbitrement, H. 44.

(c) 2 Vent. 242.

PARKE, B., delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded.—'The first question to be disposed of is, the rule for a new trial.

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This award appears to the Court to fall within the principle of *Cargey v. Aitcheson* (a): it is not necessarily uncertain. If the time of the last settlement mentioned in the award was uncertain, or matter in dispute, the award would have been bad. We need not decide whether the objection would have been open to the defendant on this plea; because, admitting that it was so, it appeared distinctly in proof that the date of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by them both. We have no doubt, therefore, that the award is good, and the first issue properly found for the plaintiff?

The next question is, whether the second issue be immaterial, and what is the consequence if it be not?

We are clearly of opinion that it was immaterial. The precise day of the last settlement was of no consequence, if a last settlement had been made in the lifetime of the intestate, and before the reference. If there had been no other plea on the record, the proper course would have been to award a repleader, and not to have given judgment non obstante veredicto: *Lacy v. Reynolds* (b), *Lambert v. Taylor* (c), Roll. Abr. 99. That form of judgment proceeds on the confession in the plea, and the insufficiency of the avoidance: but in this plea, there is no confession on which judgment can be given; it raises an immaterial issue, without any confession. The next question to be considered is, whether a repleader ought to be awarded, as there is another proper issue raised and decided for the plaintiff on this record, on which, if stood alone, the plaintiff would be clearly entitled to judgment. In the case of

(a) 2 B. & C. 170.

(b) Cro. Eliz. 215.

(c) 4 B. & C. 138.

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Goodburne v. Bowman (a) it is for the first time suggested, that if an immaterial issue be raised by one plea, and the cause of action is fully confessed or proved on another on the same record, the plaintiff is entitled to judgment on that confession, or proof, and a repleader would not be awarded. But the present case is distinguishable from that, for here, no plea contains a confession of any part of the cause of action, and there is no issue upon any plea establishing the truth of the whole of it; and we are not aware of any precedent that a repleader can be granted *as to part*: consequently, as there can be no judgment on a confession, there must be a repleader. To save the expense of a formal judgment, the parties should amend, without costs on either side.

On judgment of repleader or non obstante veredicto, neither party is entitled to costs; the rule of H.T. 2 Will. 4, s. 74, not affecting the law in that respect.

Subsequently a rule was drawn up, by which it was ordered "that the rule for a new trial be discharged, and that the parties be at liberty to amend without payment of costs; but if the defendant does not amend within a week, then the plaintiff to have judgment of repleader on the rule for judgment non obstante veredicto."

No amendment was made, and the plaintiff signed judgment of repleader, gave a rule to plead, and demanded a plea. The defendant then obtained a Judge's order to stay proceedings on payment of debt and costs. The Master, on taxation, allowed the plaintiff the costs of the trial of the first and third issues, and of the motion for a new trial. On the following day the plaintiff's attorney signed final judgment for want of a plea on the repleader, and the Master allowed the further costs of such judgment.

R. V. Richards obtained a rule nisi for the Master to review his taxation, and to set aside the final judgment,

(a) 9 Bing. 532; S. C., 2 M. & Scott, 700.

and that upon payment of debt and costs all further proceedings should be stayed.

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W.H. Watson shewed cause.—It must be admitted that, before the first rule of H. T. 2 Will. 4, s. 74, neither party was entitled to any costs on a judgment of repleader. But that rule, which directs that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, has introduced a new principle of taxation. The costs on a judgment of repleader are governed by the same principle as on a judgment non obstante veredicto: *Da Costa v. Clarke* (a); and since the new rules, on this latter judgment, the plaintiff would be entitled to the costs of the issues found for him, and the defendant to the costs of the issue found for him.

PARKE, B.—The contrary has been decided by the Court of Common Pleas, in the case of *Goodburne v. Bowman* (b), and I think rightly. A party cannot have the costs of issues found for him, where there is a judgment non obstante veredicto. The rule referred to does not affect the case: it is not one of the rules made in pursuance of an act of Parliament, and therefore cannot alter the law. All that rule did was to put a right construction on the 23 Hen. 8, c. 15, thus over-ruling those cases which decided that a defendant is not entitled to costs, where he succeeds on part of a divisible cause of action. The present case must follow the general rule of a repleader; the parties must begin again from the first fault, and the other pleadings go for nothing. The rule must be absolute for the Master to review his taxation, and also to set aside the judgment, but without costs.

Rule absolute accordingly.

(a) 2 B. & P. 376.

(b) Ante, Vol. 2, p. 206.

1837.

AUGARDE and Others, Assignees of WILLIAM LAST, a
Bankrupt, v. THOMPSON.

Where a defendant has become bankrupt, the plaintiff cannot discontinue upon the terms of the 59th section of the Bankrupt Act, unless he has either proved his debt before the commissioners, or had his claim entered on the proceedings under the fiat.

DEBT for goods sold and delivered, and for money due upon an account stated with Last, before his bankruptcy, and with the plaintiffs as assignees since the bankruptcy. The defendant pleaded *nunquam indebitatus* and a set-off. It appeared that, on the 4th of November, which was before the plaintiff replied, the defendant became bankrupt. On the 5th of November, notice was given to the defendant, that the plaintiffs had elected to proceed under the commission, and that no further proceedings would be taken in the action. On the 9th of November, the defendant ruled the plaintiffs to reply, upon which they applied to the Court, and obtained on the 14th a rule to stay proceedings, upon an affidavit that they had relinquished their action, with the intention of proving the debt under the fiat. On the 13th of January following *Crowder* moved for a rule to shew cause why the defendant should not be at liberty to sign judgment for want of a replication, and why the plaintiff's rule to stay proceedings should not be rescinded. The affidavit, in support of this motion, stated, that the plaintiff's attorney had taken out a summons to set aside the proceedings, on the ground that the action had abated by the bankruptcy of the defendant, which was attended before *Bolland, B.*, at chambers, on the 7th and 10th of November, when the learned Baron decided that the action did not abate: that on the 9th of November, the defendant's attorney served the plaintiff's attorney with a rule to reply: that the plaintiffs did not reply, but obtained the before-mentioned rule to stay proceedings: that Last, on the 4th of January, attended before the Commissioner, when he and the defendant were examined: that Last stated the defendant's account to be correct, and that there was a balance due to the defendant, and that

in consequence, the Commissioner refused to allow the plaintiffs to prove any debt.

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Platt and *S. Hughes* shewed cause.—The question arises on the 59th section of the 6 Geo. 4, c. 16, which enacts, “that no creditor, who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under such commission against such bankrupt, shall prove a debt under such commission, ‘or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed.” The object of the clause is to afford a mutual protection. The *claiming* a debt under the commission is declared to be a relinquishment of the action, and the Court will not allow judgment to be signed for want of a replication, when the plaintiffs have no power to go on. In *Ex parte Woolley* (a), which arose on the 49 Geo. 3, c. 121, s. 24, a creditor’s claim had been rejected by the Commissioners on the ground that he ought to have produced the rule to discontinue his action before he was allowed to prove under the commission; and the Lord Chancellor says, “If the creditor discontinues, he does it under the uncertainty whether his claim will be admitted or not, while, on the other hand, by the act of Parliament, the proof or claim itself operates as a discontinuance.” *Kemp v. Potter* (b), only decided that where the plaintiff elected to proceed under the commission, the defendant was entitled to have some entry or suggestion of that fact on the record. That might have been done in the present case, if the defendant had re-

(a) 1 Rose, B. C. 394.

(b) 6 Taunt. 549.

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quired it. After the notice of the 5th November, and the rule to stay proceedings, the plaintiffs were clearly precluded from going on.

Crowder, in support of the rule.—The object of the Legislature was to prevent the creditor from pursuing two remedies at the same time. [Lord *Abinger*, C. B.—The clause declares that the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed.] The word “claim” does not mean merely the demand of debt, but a specific sum must be shewn to be due. The claim must be such that some entry of it appears on the proceedings of the Commissioners. A fictitious allegation of a debt will not satisfy the statute; for, if it were so, a party who had brought an action, however wrongfully, might, by setting up his false claim before the Commissioner, release himself altogether from the costs of the action. To operate as a discontinuance of the action, there must be a rightful claim properly entered. Until it is admitted, no claim in fact exists. [*Parke*, B.—In *Ex parte Frith* (a), it was held, that a party tendering the proof or claim of a debt under a commission, is entitled to the judgment of the Commissioners upon his right to prove or claim, before he discharges the bankrupt or relinquishes the action.]

Cur. adv. vult.

Lord ABINGER, C. B.—The question in this case was, whether the plaintiff had done sufficient to constitute an election to prove under the commission, within the meaning of the 59th section of the Bankrupt Act. We are of opinion that a party cannot apply to the Court to discon-

(a) 1 Glyn & J. 165.

time his action, unless he has either proved a debt or had his claim entered on the proceedings under the fiat. The words of the clause are, "that no bankrupt who has brought any action, &c., in respect of any demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or *have any claim entered on the proceedings under such commission*, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed." Under these words of the statute we are of opinion, that plaintiff cannot discontinue unless he has either proved a debt, or had his claim entered. In the present case he has done neither. We think that there is no injustice in saying that he cannot have the privilege of discontinuing the action without payment of costs, unless he has adopted one or other of those courses. That part of the rule which prays that the defendant may be at liberty to sign judgment must be discharged; but the order to stay the proceedings must be rescinded.

Rule accordingly.

GOUGH v. BRYAN.

CASE for the negligent driving of an omnibus by the defendant's servant, by means whereof it came in collision with the plaintiff's carriage, and in consequence his sons and servant were greatly hurt. Plea.—Before the said time when &c. the said carriage of the plaintiff, and the

To an action for negligence in driving an omnibus, defendant pleaded that plaintiff's carriage was under the government of one of his sons, and that

if the said son had driven in a moderate and skilful manner, the collision would not have happened; but that he drove so unskilfully, and with such velocity, that the carriage of the plaintiff struck against the stage-coach of the defendant; concluding with a special traverse that the collision was caused by the carelessness of defendant's servant:—*Held* bad, as amounting to the general issue.

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said horses then drawing the same, were under the guidance, government, management, and direction of one of the said sons of the plaintiff, who was then driving the same in and along the said highway, and the said servant of the defendant was then carefully, skilfully, and properly driving the said stage coach of the defendant, and the horses drawing the same, in and along the said highway; and the defendant further saith, if the said son of the plaintiff who was so then driving the said carriage and horses of the plaintiff in and along the said highway, and so had the guidance, management, government, and direction thereof, had driven and guided, governed, managed, and directed the said carriage and horses of the plaintiff carefully, skilfully, and properly, and in as moderate a manner as he ought to have done, no collision would have taken place between the carriage of the plaintiff and the said stage coach of the defendant, nor would any damage or injury have been occasioned to the said carriage and horses of the plaintiff, or either of them, or to the said sons or servant of the plaintiff, or to either of them; but he further says, that just before and at the said time when &c. the said son of the plaintiff who so had the guidance, government, management, and direction of the said carriage and horses of the plaintiff, drove, guided, managed, and directed the same so carelessly, negligently, unskilfully, and improperly, and with such velocity and violence in and along the said highway, that the said carriage of the plaintiff, at the said time when &c., ran and struck, and was drove with great force and violence upon and against the said stage coach of the defendant, and by means thereof, and without any carelessness, improper driving, government, and direction of the said coach and horses of the defendant, and without the carelessness, improper conduct, or default of the defendant by his said servant, the coach of the defendant ran and struck upon and against the said carriage of the plaintiff, whereby the

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supposed damage and injury in the declaration mentioned were caused and occasioned as therein alleged, and so the defendant, if any hurt or damage then happened or was occasioned to the said carriage or horses of the plaintiff, or either of them, or to his sons or servant, or either of them, the same happened and was occasioned by the carelessness, negligence, unskilfulness, and improper conduct of the said son of the plaintiff who was so driving the carriage and horses of the plaintiff, and by the velocity and violence with which the said son and servant of the plaintiff so drove the said carriage and horses of the plaintiff, which running struck the said coach of the defendant upon and against the said carriage of the plaintiff, and caused and occasioned as in this plea mentioned the violence and supposed running and striking of the said coach of the defendant against the carriage of the plaintiff, whereof the plaintiff hath above thereof complained against the defendant, without this, that the defendant, at the said time when &c., by his said servant, so carelessly, unskilfully, and improperly drove, governed, and directed his said coach and horses, and by and through the carelessness and improper conduct of the defendant, by his said servant, so that he the defendant then ran and struck with great force and violence upon and against the carriage of the plaintiff modo et forma.

Special demurrer, assigning for cause that the plea is argumentative, and amounts to the general issue.

The Court called on

Kelly, in support of the plea.—Since the new rules the plea is good. The plea of not guilty operates only as a denial of the wrongful act, but not of the facts stated in the inducement. Here, the declaration states that the defendant was possessed of a stage coach then under the government of a servant of the defendant, and that the servant so negligently conducted himself that the accident

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in question occurred. Each of those allegations is material to the maintenance of the action, but the general issue is now merely a denial of a separate allegation in the declaration. The effect of the new rules has been to do away with that plea, and the objection that this plea amounts to the general issue does not apply, since the general issue has ceased to exist. [Lord *Abinger*, C. B.—The effect of the rule is, that the general issue only denies the fact, and not the inducement.] The objection to the plea is, that it puts the whole defence upon the record, and gives greater effect to the rule itself. This plea has not the same force as the general issue, nor does it deprive the plaintiff of any particular replication he might have had.

LORD ABINGER, C. B.—The principal ground upon which a special plea amounting to the general issue was held bad was, that it contained unnecessary and superfluous matter. Before the new rules, if a declaration in this form was followed by a plea denying each of the facts, and concluding to the country, that would have been bad. I cannot accede to the proposition that the new rules have abolished the general issue; they have only circumscribed the species of evidence that may be proved under it, and it is still open to plead all the circumstances. All the old objections to the special general issue are equally sustainable upon special demurrer.

Gurney, in support of the demurrer.

Judgment for plaintiff.

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BOLTON v. MANNING.

SHEE obtained a rule to set aside a judgment for irregularity. An appearance had been entered for the defendant under the statute, and on the 27th of April the plaintiff served a notice of declaration, and demanded a plea. On the 1st of May, the defendant took out a summons for further time to plead, returnable in the afternoon of the 2nd of May. On the morning of the 2nd of May, judgment was signed. The objections were, that the rule to plead had been filed before the notice of declaration was served (a), and also that no notice of taxation had been given, pursuant to R. T. 1 Will. 4.

Moody shewed cause.—The defendant is not entitled to a demand of plea when he has allowed an appearance to be entered for him; and the same principle will apply to a rule to plead. [*Parke*, B.—There must be a rule to plead in all cases, whether the defendant has appeared or not: it is so stated in *Tidd's Practice* (b).] Then that objection has been waived by the summons for further time to plead: *Nugee v. M'Donell* (c). As to the other objection, the omission to give notice of taxation of costs does not necessarily make the judgment irregular. [*Parke*, B.—I have frequently decided so at chambers.]

Shee, in support of the rule.—When an appearance is entered for the defendant, there is no declaration until notice is served. [*Parke*, B.—That objection is waived by the summons for time to plead.] No attention was paid to the first or second summons; if the summons had been attended it might have been a waiver, but the plaintiff has treated them as a nullity. But, at all events, there

An appearance was entered for the defendant, and, after notice of declaration and demand of plea, he took out a summons for time to plead, which was not returnable until after the time for pleading expired. The plaintiff signed judgment:—*Held*, that a rule to plead was necessary, though an appearance had been entered for the defendant, but that the objection was waived by the summons for time.

The rule which requires notice of taxation of costs does not apply unless the defendant has appeared.

(a) See *Bennett v. Smith*, ante, p. 353.

(b) Vol. 1, p. 473.

(c) Ante, Vol. 3, p. 579.

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should have been a notice of taxation of costs. [*Parke*, B.—That rule does not apply, unless the defendant has appeared (a).]

Lord ABINGER, C. B.—The grounds of irregularity have been sufficiently answered.

Rule discharged.

(a) See 17 Reg. Gen. H. T. 4 Will. 4, ante, Vol. 2, p. 308.

CAPEL v. STAINES.

An attorney is not entitled to the costs of more than one letter sent before the commencement of the suit.

DAVISON moved for a rule to shew cause why the Master should not review his taxation, and allow to the plaintiff or his attorney the costs of letters written, and the postage of letters paid by him before the commencement of the action. After the cause had proceeded as far as the declaration, an order was made by consent, that proceedings should be stayed on payment of debt and costs. Before the writ was sued out, fifteen letters requiring a settlement of the demand had been written by the plaintiff's attorney, and he had received fourteen letters from the defendant, for thirteen of which he had paid the postage. The defendant had requested that time should be given, and every accommodation was shewn by the plaintiff's attorney. The Master refused to allow the costs of more than one letter.

Lord ABINGER, C. B.—The usual practice is to allow for one letter only; if more were allowed, there might be two letters a day sent by the twopenny post.

PARKE, B.—It is much better to abide by the general rule. If this application were allowed, the next attempt would be to introduce a letter every day.

Rule refused (a).

(a) *Morison v. Summers*, ante, Vol. 1, p. 325.

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HEDGER v. STEVENSON.

Reported also 2 M. & W. 729.

THE declaration stated that one Samuel Thompson, on the 10th day of August, 1835, made his promissory note in writing, and thereby promised to pay to the order of the defendant, at Messrs. Barclay, Tritton, and Barclays, London, 99l. 18s., two months after the date thereof, for value received, which period had, at the commencement of the suit, elapsed: and then delivered the said note to the defendant, and the defendant then indorsed the said note to the plaintiff, *and promised to pay the same according to the tenor and effect thereof:* but the said Messrs. Barclay, Tritton and Co., did not, nor did the said S. T., nor did the defendant or any other person pay the said note, although the same was presented at Messrs. Barclay, Tritton and Co.'s on the day when it became due, whereof the defendant had notice. Plea—that defendant had no notice of dishonour. A verdict having been found for the plaintiff (a),

In an action by indorsee against indorser of a promissory note, the declaration alleged a promise to pay the note "according to the tenor and effect thereof," and assigned, as a breach, that the maker did not pay the note, nor *did* the defendant or any other person, although the note was duly presented when it became due, whereof the defendant had notice:—*Held*, that the promise was not incorrectly laid, and that the breach was sufficient after verdict.

W. H. Watson obtained a rule to arrest the judgment, on the ground, first, that the promise alleged in the declaration was to pay the note according to the tenor and effect thereof, whereas the obligation in law was to pay on request upon the default of the maker: secondly, there was no sufficient breach, inasmuch as the defendant was not bound to pay until after the note had been presented.

Humfrey and *Hoggins* shewed cause.—The promise to pay according to the tenor and effect of the note, is a promise to pay after notice of dishonour. The declaration states the indorsement of the note and the dishonour, and

(a) The verdict was taken subject to the opinion of the Court as to the sufficiency of the notice,

and the Court decided in favour of the plaintiff.

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that the defendant being liable promised to pay; that is, in case he had due notice of dishonour. There is a sufficient breach. The declaration avers that Messrs. Barclay, Tritton, and Co. did not, nor did the maker of the note or the defendant pay the same; that must be taken that they did not pay the note in the manner in which they respectively ought to have paid it, viz. the one at the time of presentment, and the other after notice of dishonour. But at all events the declaration is good after verdict.

W. H. Watson, in support of the rule.—The promise is not according to the obligation which the law casts upon the indorser of a note. He is only liable after the note has been duly presented and after due notice of dishonour, and then he becomes liable to pay *upon request*. In the case of a guarantee for due payment upon default of A. B., it would not be proper to declare as upon a direct undertaking to guarantee. If the obligation as stated is bad, it is equally so after verdict, for the promise in law is to answer upon two conditions—the presentment and notice; but here it is to pay according to the tenor and effect of the note. The breach is bad; it does not state he did not pay the note after he had notice of the presentment and dishonour. It does not aver that he *hath* not paid, but that he *did* not pay.

PARKE, B.—The rule to arrest the judgment must be discharged. It was first objected that the promise alleged in the declaration was not the correct legal promise. I thought, when the rule was granted, and am still of opinion, that this is not an incorrect mode of laying the promise, especially after verdict; it is the promise which results from the fact of the indorsement. The declaration states that S. T. drew the note payable to the defendant, and delivered it to him, and the defendant indorsed it to the plaintiff, and promised to pay it according to the tenor and

effect thereof, that is, according to the tenor and effect of the note so indorsed. That is not an improper description of the liability of the indorser, viz. that he will pay the note when due if not paid by the maker, in case he received due notice of dishonour: such is the legal interpretation of the promise of the indorser. Then it is further objected, that there is no sufficient breach. I am of opinion that this breach may be so read as to constitute a good breach, that is, a nonpayment by the indorser after presentment and due notice of dishonour. The allegation is that the said Messrs. Barclay and Co. did not, nor did the said S.T., nor did the defendant or any other person pay the said note; that is, at any time. I am of opinion there is a sufficient breach after verdict; but whether or no it might have been bad on special demurrer, we are not called upon to say.

BOLLAND and ALDERSON, Bs., concurred.

Rule discharged.

FISHER v. The THAMES JUNCTION RAILWAY COMPANY.

THIS was an action on the case for injury done by the defendants to the plaintiff's reversionary interest in certain property. The defendants were desirous of pleading the general issue, and also pleas denying that the plaintiff was possessed of the reversion, and that the person stated to be tenant in the declaration was tenant. *Gurney*, B., having refused, at chambers, to allow these pleas to be pleaded together with the general issue,

In case for injury to the plaintiff's reversionary interest, the defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be

tenant in the declaration was not tenant. The defendants were a company incorporated by act of Parliament, which enabled them to plead the general issue, and give in evidence that the act complained of was done in pursuance of the authority of that act. The Court refused to allow the other pleas, together with the general issue.

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Shee now moved to plead these several matters. The act of the company contained a clause enabling them, in every action, suit, or information, to plead the general issue, and to give the act and special matter in evidence at the trial, and that "the act complained of was done in pursuance of or by the authority of the statute." The pleas traversing the interest of the plaintiff and the alleged tenant were not within this clause, which differed from the usual form in acts of Parliament, which allowed the general issue to be pleaded. [*Alderson*, B.—There is a case in this Court on the point.] The case of *Neale v. M'Kensie* (a); but that case is different from the present; here, the matters of defence do not come within the terms of the act, which enables the defendant to shew that the wrong complained of was done *in pursuance of or by the authority of the act*.

LORD ABINGER, C. B.—The new rules have not deprived the party of the general issue, where it is given by statute (b), and before the new rules, these pleas could not have been pleaded. You may make an election to plead the general issue or the special matters.

ALDERSON, B.—This seems to be the precise case of *Neale v. M'Kensie*, and that the general issue would put these matters in issue. If special pleas were allowed together with the general issue given by statute, it would deceive the plaintiff, who supposes that the defendant means to rely on the matters specially pleaded, and not to give others in evidence under the general issue.

(a) Ante, Vol. 2, p. 702.

(b) Ante, Vol. 2, p. 312.

LEVI v. PRICE.

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IN this case a writ of error coram vobis was sued out on the 17th of February, and notice thereof given to the plaintiff's attorney on the 22nd. On the 19th of April the plaintiff levied on the defendant's goods under a fieri facias, and on the same day, after the levy, the writ of error was allowed.

A writ of error coram vobis is a supersedeas from the time of notice that it is sued out, and not from the time of allowance only.

Mansel moved to set aside the writ of fieri facias for irregularity, and cited *Birch v. Triste* (a), as an authority that the statutes requiring bail in error do not apply to error coram vobis.

The 6 Geo. 4, c. 96, s. 1, requiring bail in error, does not apply to error in fact.

Humfrey shewed cause, and contended that since the rules of 1 Reg. Gen. H. T. 2 Will. 4, s. 83 (b), and 9 Reg. Gen. H. T. 4 Will. 4 (Practice Rules) (c), a writ of error was a supersedeas from the time of its allowance only, and not, as formerly, from the time of notice. The 6 Geo. 4, c. 96, s. 1, expressly required bail in error.

PARKE, B.—The 6 Geo. 4 is in pari materiâ with the statute of James; and *Birch v. Triste* decided that the latter act did not apply to error in fact. Neither do the new rules apply to error in fact. The plaintiff should have applied to the Court for leave to take out execution.

Rule absolute, no action to be brought.

(a) 8 East, 412.

(b) Ante, Vol. 1, p. 194.

(c) Ante, Vol. 2, p. 306.

EDMUNDS v. GROVES.

ASSUMPSIT by indorsee against maker of a promissory note. Plea: that the consideration for the note was

Assumpsit by indorsee against maker of a promissory note.

Plea, that the note was made for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration. Replication, that plaintiff had no notice of the illegality of the consideration, and that he gave value:—*Held*, that, upon these pleadings, it was incumbent on the defendant to give some evidence of the illegal concoction of the note, before the plaintiff could be called upon to prove he gave value.

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money lost by gaming; and that it was indorsed to the plaintiff with notice thereof, without consideration or value. Replication: that the note was indorsed to the plaintiff without notice of the illegal consideration, and for good and sufficient consideration and value; on which, issue was joined. At the trial, before Lord *Abinger*, C. B., at the Middlesex Sittings after Easter Term, no evidence was given on either side, the plaintiff's counsel contending that the onus rested with the defendant to shew the illegality of the original consideration: on the other hand it was insisted that the replication admitted the note to have been made for a gaming debt, and that the plaintiff was bound to prove he had given value. The learned Judge directed a verdict to be entered for the plaintiff, reserving for the defendant liberty to move to enter a nonsuit, if the Court should be of opinion that the original illegal consideration was admitted on the record.

W. H. Watson now moved accordingly.—The replication admits the note to have been made in consideration of a gaming debt. By replying *de injuriâ*, the plaintiff might have put the whole plea in issue; but as he has adopted a form of replication which admits the note to be tainted with illegality, that fact must be taken against him, with all its consequent inferences. There being then a suspicion cast upon the plaintiff's title, he was bound to prove that he gave consideration: *Heath v. Sansom* (a). [*Alderson*, B.—The jury try the matter in issue only, the pleadings are not before them.] They try the issue with reference to the state of facts appearing on the record.

LORD ABINGER, C. B.—I am of opinion that there ought to be no rule in this case. It is clear, from the recent decisions of this Court, that it was incumbent on the defend-

(a) 2 B. & Ad. 291.

ant, who set up a defence that the plaintiff took the note with notice of its original illegality, to have given at least some evidence to prove it. It is not necessary to say what evidence would be sufficient; when all the facts of the case are before the jury, it is for them to determine. The circumstance of its being improperly obtained in the first instance may cast such suspicion on the plaintiff's title, that unless he rebuts any inference which may arise from his connexion with the party who obtained it, by proving that he gave value, the jury may infer that he was aware of the illegality. But upon these pleadings I think the defendant should have given evidence to connect the plaintiff with the party implicated in the illegal concoction of the note. I give no opinion upon the argument of Mr. *Watson*, as to the effect of the admission of a fact upon the record, but, as there was no evidence of the illegality, I think the verdict was right. It may be worth while considering whether the 5 & 6 Will. 4, c. 41, has the effect which was intended, of rendering securities given for gaming debts available in the hands of a bonâ fide holder for value: upon that point I give no opinion; it is still open to the defendant upon the record.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—The defendant pleads that there was a gaming transaction between him and a third person, in respect of which the note was given, and that it was indorsed to the plaintiff with full knowledge of that circumstance, and without consideration. The plaintiff replies that he had no knowledge of the illegal transaction, and that he gave value. This form of pleading is said to be an admission on the part of the plaintiff, sufficient to raise an inference against him of the existence of facts passing between the defendant and a third person. But I apprehend that is a wrong conception of the effect of an admis-

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sion on the record. An admission on the record is merely a waiver of requiring proof of those facts which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they must have those facts proved like any others. In the present case, there was nothing to go to the jury from which they could infer that the note was illegal in its inception. As the defendant gave no evidence, the plaintiff was entitled to a verdict.

Rule refused.

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3. Where a rule has been substantially disposed of, it cannot afterwards be objected, that the affidavits upon which the rule was drawn up are not correctly intitled. *Viner v. Langton*, 92

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1. If, by the submission, the costs of an arbitration are to abide the event, it is an excess of jurisdiction for the arbitrator to determine their amount. *Kendrick v. Davies*, 693

2. If an arbitrator directs mutual releases on payment of a sum of money, over which he has jurisdiction, as well as of a sum over which he has none, the award is good as to the former. *Ib.*

3. An application to set aside an award made under 9 & 10 Will. 3, c. 15, must be made before the last

day of the next term after the publication of the award, and if the submission is not made a rule of Court until a subsequent term, it is too late to disturb the award. *Reynolds v. Askew*, 682

4. In order to set aside an award at common law, very strong reasons must be shewn for not applying within the first four days of the term following the making the award. *Ib.*

5. To an action for goods sold and delivered, defendant pleaded as to 30*l.*, parcel &c., payment of 30*l.* in satisfaction. Defendant replied, that the 30*l.* was paid for another and a different cause of action, specially traversing the acceptance of it in satisfaction of that sum in the declaration mentioned. The cause was referred; and upon this issue the arbitrator found for the defendant as to 3*l.*, and for the plaintiff as to the residue:—*Held*, that the award was sufficiently certain, and that this finding in effect assessed the damages at 27*l.* *King v. Earl of Dundonald*, 589

6. A rule to set aside an award must be drawn up on reading the award. *Barton v. Ransom*, 597

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8. Where an arbitrator has the power to enlarge the time for making his award, and the enlargements are made a part of the rule of Court, an affidavit of such enlargements is not necessary in order to obtain an attachment. *Ib.*

9. If a cause is referred to an arbitrator, the costs to abide the legal event, it is an excess of authority to award a stet processus. *Hunt v. Hunt* 442

10. Where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award. *Ib.*

11. Where a cause is referred without an order of Nisi Prius to an arbitrator to certify, it is not necessary that he should make his certificate within the time within which the jury process is returnable. *Salter v. Yeates*, 291

12. A reference of an indictment for conspiracy, together with other matters in difference, is not within the meaning of the 3 & 4 Will. 4, c. 42, s. 39, and therefore the parties may revoke the authority of the arbitrator, without leave of the Court or a Judge. *Rex v. Shillibeer*, 238

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14. A bailable writ having been sued out of this Court against an attorney of the King's Bench, he, after some attempts to compromise, obtained a Judge's order to stay the proceedings on payment of the debt and such costs as the prothonotary should under the circumstances think reasonable. The prothonotary having allowed the costs of bailable process:—*Held*, that the parties were concluded by his determination. *Meggs v. Binns*, 28

15. Where a cause is referred and a verdict entered, a motion to impeach the award must be made within the first four days of the following term. *Lyng v. Sutton*, 39

16. If a cause and all matters in difference are referred to an arbitrator, and he makes a separate adjudication as to the action, the defendant is not precluded from applying for his costs, under the 43 Geo. 3, c. 46, on

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17. Where a cause and all matters in difference are referred to an arbitrator, and by his award he merely directs a verdict to be entered in favour of the plaintiff for one entire sum, the award is not final, and therefore bad. *Gyde v. Boucher*, 127

18. Where a party consents to a Judge's order for a reference to the Master, and undertakes to pay the sum found due, he cannot afterwards dispute the amount for which the Master has given his allocatur. *Watkins v. O'Gorman Mahon*, 178

19. The declaration stated that differences were pending between the plaintiff, as administratrix, and the defendant, concerning divers sums of money, of part of which there had been a settlement on a day certain in the lifetime of the intestate, to wit, on &c.: it then stated the submission to arbitration, and that the arbitrator awarded that there was due from the defendant to the plaintiff, as administratrix, 150*l.*, together with interest on the same *from the period of the last-mentioned settlement*. The defendant pleaded, first, that the arbitrator did not make any award; secondly, that the day in the declaration mentioned was not the day of the last settlement; and, thirdly, that no settlement was made. The first and third issues were found for the plaintiff, and the second for the defendant:—*Held*, that the second issue was immaterial. *Held*, also, that the award was final; it appearing that the date of the last settlement was certain, and not a matter in dispute. *Plummer v. Lee*, 755

ARREST.

1. The Court will not set aside an arrest upon the merits, unless it clear-

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ly appears that the process of the Court has been abused. *Mason v. Smith*, 179

2. The Court will not discharge a defendant out of custody, on the ground that the debt for which he has been arrested is founded on an illegal consideration, and an injunction has issued from the Court of Chancery to stay proceedings at law; if, however, the process of the Court has been abused for the purpose of oppression, the Court will interfere. *Curzon v. Hodges*, 98

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Where an attorney defendant claims a privilege from arrest *eundo*, it must clearly appear that he *left home* for the purpose of attending the Court. *Strong v. Dickenson*, 86

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1. To bring a party into contempt

for non-payment of costs, pursuant to the Master's allocatur, a copy of the rule and allocatur must be left with the defendant. *Dalton v. Tucker*, 550

2. If an award directs costs to be paid in equal proportions by several persons, a separate attachment must be obtained against each for their nonpayment. *Gulliver d. Hodson v. Summerfield*, 401

3. It is no answer to a rule for an attachment, that the Judge's order, which has been made a rule of Court, has not been personally served, if the rule itself has been regularly served. *Greenwood v. Dyer*, 255

4. If a defendant will not take the copy of an award and rule, the other requisites of a service being complied with, it is sufficient for a rule nisi for an attachment. *Ellis v. Giles*, 255

5. *Semble*, that where a plaintiff is entitled to an attachment, pursuant to Reg. Gen. H. T. 3 Will. 4, against the sheriff for not obeying a Judge's order in vacation to bring in the body, although the defendant is afterwards rendered in vacation, he is bound to apply for the attachment *promptly* in the following term. *The King v. The Sheriff of Middlesex*, 245

6. In order to obtain an attachment against the sheriff for not returning a writ pursuant to a Judge's order, the original order must be shewn at the time of serving a copy of it. *Granger v. Fry*, 21

7. Where a copy of a rule nisi for an attachment was delivered to defendant's son, who refused to say where his father was, and an appointment was made for a subsequent day, that was held not sufficient to dispense with personal service. *In re Ibbertson*, 160

8. The Court will not grant a rule, requiring an attorney to deliver up papers, and in the alternative for an attachment in case of a non-delivery, but each branch must be made the

subject of a separate motion. *Roscoe v. Hardman*, 157

9. A rule for an attachment against an attorney for nonpayment of money pursuant to his promise, cannot be obtained; but a previous rule requiring the payment of the money must have been made absolute. *Twiss v. Fry*, 157

10. In order to obtain an attachment for not obeying a subpoena ad testificandum, the affidavit must state the party to be a material witness. *Tinley v. Porter*, 744

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1. When it is sought to make a rule absolute against an attorney, requiring him to answer the matters in the affidavit, and he does not appear, he must be called in Court. *In re Whicker*, 715

2. Where an attorney has been employed to prepare mortgage deeds, and he receives the money raised by the mortgage, he may be called upon summarily to account for it. *Ex parte Crispwell*, 689

3. A country attorney, admitted in the King's Bench, conducted a suit though a London agent, who was an attorney of the Exchequer. The name of the country attorney was indorsed on the writ, and in his affidavit of increase he swore he was the attorney in the cause:—*Held*, that he was entitled to recover his costs. *Jones v. Jones*, 474

4. *Semble*, that 2 Geo. 2, c. 23, s.

10, does not apply to the case of a country attorney practising in the name of a London agent. *Ib.*

5. The Court will not compel an attorney to answer the matters in the affidavit, merely because he has hired insufficient bail to justify in an action. *Clifford v. Parker,* 226

6. The Court will not summarily compel an attorney to pay money, pursuant to his undertaking to indemnify against costs, in an action where, at his instance, a party has allowed his name to be used as a plaintiff, without any interest in the matter. *Ex parte Clifton,* 218

ATTORNEY (ADMISSION OF).

1. Where the articles of a clerk expire on the 1st June, and the time at which they ought to have been deposited at the hall of the Incorporated Law Society, pursuant to the rules of E. T., 6 Will. 4, had ended on the 30th May, and the day of examination was the 5th June, the Court, on the 2nd June, ordered the articles to be received. *Ex parte Cooper,* 703

2. Under 5 Reg. Gen. H. T. 6 Will. 4, as to notices of applications to be admitted as an attorney, Sunday will reckon as one day. *Ex parte Bumps,* 713

3. Where a clerk has omitted to send in his answers to the questions, pursuant to Reg. Gen. E. T. 6 Will. 4, within the time limited by the examiners, in consequence of his agent omitting to transmit them in sufficient time, the Court allowed him to send in the answers subsequently, the agent paying the costs of the application. *Ex parte Holland,* 681

4. Mere ignorance of the rules as to the admission of attorneys will no longer be an excuse for non-compliance with them, *Ib.*

5. Under special circumstances the Court will allow the name of a per-

son applying for admission as an attorney to be introduced into the Master's list on the first day of term, although the notices have not been given "three days at the least before the commencement of the term," pursuant to 5 Reg. Gen. H. T. 6 Will. 4, *Ex parte Blunt,* 231

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1. Charges in an attorney's bill for preparing the acknowledgment of a married woman, and for attending before the commissioners, &c., under the 3 & 4 Will. 4, c. 74, do not render the bill taxable under the 2 Geo. 2, c. 23. *In re Branston,* 623

2. The charges in an attorney's bill for attendances on his client, to advise him on matters subsequent to the conclusion of an action, do not render it necessary that a bill should be delivered a month before action brought. *Pepper v. Yeatman,* 155

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See AFFIDAVIT, 3—ATTORNEY, 2—COSTS, 6—SMALL DEBTOR, 1.

Where an attorney has received money from the defendant in a cause, on account of his own client, who is plaintiff, the lapse of nine years, though unaccounted for, will not prevent the account between him and his client being referred to the Master. *Ex parte Sharpe,* 717

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See AFFIDAVIT, 3, 7, 8.

ATTORNEY (LIEN OF).

See Costs, 5.

1. On a reference to arbitration of an action of ejectment and all matters in difference between the parties, the arbitrator directed that a sum of 50*l.* should be paid by the lessor of the plaintiff to the defendants by way of compensation for certain buildings erected by them, and that a verdict should be entered for the former. On motion, the Court directed the sum awarded to the defendants to be set off against the costs of the lessor of the plaintiff, saving the lien of their attorney. *Doe d. Swinton v. Sinclair*, 26

2. The plaintiff, a builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited: the cause was referred, and the arbitrator found a sum due to the plaintiff:—*Held*, that the plaintiff's attorney had a claim, as against the assignees, to the amount of his lien on the award for the costs of the action and of the award. *Jones v. Turnbull*, 591

3. An attorney acting as commissioner under 3 & 4 Will. 4, c. 74, has a lien upon the acknowledgments and deeds which may come into his possession as such commissioner, for his fees in taking the acknowledgment, but not for those of his brother commissioner, unless he can shew a joint authority. *Ex parte Grove*, 355

ATTORNEY (NEGLIGENCE OF).

The writ issued on the 5th September, and was sent to the under-sheriff of Hants on the 16th October. The order for a stay of proceedings was made on the 20th, on which day the plaintiff's attorney wrote to the under-sheriff at Winchester, desiring to be informed what was the amount of his and the officer's charges, and

informing the under-sheriff that a Judge's order had been obtained for staying the proceedings. The debt and costs were paid on the 31st of October. On the 4th of November, the defendant was arrested on the same writ in Hampshire, and gave a bail-bond. A Judge's order having been obtained for cancelling the bail-bond, with costs, and those costs having been paid by the plaintiff, he obtained a rule calling upon his attorney to shew cause why he should not repay to him the sum so paid for costs:—*Held*, that the attorney had not under the circumstances been guilty of such a degree of negligence as to render him liable—at least on motion. *Meggs v. Binns*, 28

ATTORNEY (PRIVILEGE OF).

The Uniformity of Process Act has not abolished the privilege of an attorney to be sued in the court to which he belongs. *Lewis v. Ker*, 447

ATTORNEY (RE-ADMISSION OF).

1. The Court will not re-admit an attorney who has discontinued practice for thirty years. *Ex parte Billings*, 395

2. Where an attorney has obtained a rule for his re-admission, but ill health has prevented him taking out his certificate, and he has not practised, he may be re-admitted in a subsequent year, on terms, without the usual notices. *Ex parte French*, 374

3. An attorney may, under peculiar circumstances, be re-admitted without the usual term's notice, where he has been off the roll from the 15th to the 17th November. *Ex parte Minchin*, 253

4. It is no objection to an attorney being re-admitted, without payment of fine or arrears of duty, that he has

acted as an attorney in a borough court, where persons, not attorneys, may practise, and has served process for other attorneys. *Ex parte Thomson*, 275

5. Where an attorney, having ceased to practise, has been re-admitted in the K. B., he may be re-admitted in the Exchequer, upon reading the rule for his re-admission in the K. B., without putting up a notice, or making the usual affidavit. *Ex parte James Parry*, 81

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BAD FAITH.

Where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant; but they refused to make the defendant's attorney pay the costs, because he was not present at the trial when the objection was taken, and had given no instructions to the counsel to do so. *Doe d. Tindal v. Roe*, 420

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See AFFIDAVIT, 9—ATTORNEY, 5—ERROR, 5—EXECUTION, 2—RENDER, 1, 2—SHERIFF, 10—STAY OF PROCEEDINGS, 2—WAIVER, 1.

1. If the addition of bail, in an affidavit of justification, is omitted, it is a fatal defect. *Benbow's Bail*, 714

2. Where bail swore that they were worth property "over and above all their just debts," instead of "over and above *what will pay* all their just debts," as prescribed by 1 Reg. Gen. H.T. 2 Will. 4, s. 19, the objection was

held sufficient to release the plaintiff from the costs of opposition, the bail having justified. *Miller's Bail*, 602

3. If, in the affidavit of sufficiency, made under the rules of T. T. 1 Will. 4, the bail swear themselves "possessed," instead of "worth," the required sum, it is not a ground for rejection, but merely of depriving defendant of costs of justifying. *Carter's Bail*, 577

4. Bail having been put in, but rejected, fresh bail cannot be received without leave obtained, though fresh notice shall have been given to the plaintiff. *Vestris's Bail*, 622

5. In order to compel a justification of bail, it is sufficient to except to one of them. *Feltham v. King*, 658

6. If time to put in bail in a country cause is given by a judge's order, the bail must not only be taken, but the bail-piece transmitted and filed, within the limited time, notwithstanding 1 Reg. Gen. H. T. 2 Will. 4, s. 14. *Craig v. Evans*, 664

7. Where a defendant seeks to justify bail in respect of a debt for which he has taken the benefit of the Insolvent Act, and been remanded, the Court will not permit the justification. *Stone's Bail*, 667

8. In an action against the acceptor of a bill of exchange, the *drawer* may become bail. *Prine v. Beesly*, 477

9. Time was, in the first instance, given to the defendant, without the consent of the bail; one of the bail afterwards applied to the plaintiff for "further time:"—*Held*, that this application amounted to a waiver. *Spyer v. Carper*, 448

10. The first rule of T. T. 1 Will. 4, does not apply to added bail. *Key v. Mac Kyntire*, 453

11. One day's notice of justification of the same bail at chambers is sufficient. *Wilson v. Hawkins*, 436

12. Where a prisoner justifies under the two days' notice, it must ap-

pear from the affidavit that he is a prisoner. *Poole's Bail*, 449

13. If bail appear in Court to justify, it is no objection that the notice of justification omitted to state whether they would justify in person, or by affidavit. *Norton's Bail*, 85

14. A defendant cannot justify one bail, who alone appears, without the consent of the plaintiff. *White's Bail*, 138

15. A defendant, not in custody, cannot justify his bail at chambers in vacation, unless he is required to do so by plaintiff, pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 17. *Barratt v. James*, 123

16. It is no objection to the justification of bail that an alteration has been made in the bail-piece, in the name of one of the bail, if the officer taking the bail has placed his initials against the alteration. *Haywood's Bail*, 269

17. The fact of an attachment having been obtained against the sheriff for not bringing in the body, is no objection to the justification of bail. *Ib.*

18. In a notice of bail for a prisoner, two days are sufficient, notwithstanding 1 Reg. Gen. T. T. 1 Will. 4; and the fact of his being a prisoner need not appear on the proceedings, or otherwise. *Pierce's Bail*, 252

19. 1 Reg. Gen. H. T. 2 Will. 4, s. 14, as to the transmission of the bail-piece, in the case of country bail, does not apply where bail has been put in in the country to set aside regular proceedings on the bail-bond. *Day v. Greenmay*, 243

20. The Court will not allow a defendant, who is out of custody, to be bailed before a magistrate in the country, but he must surrender in Court in order to be bailed. *Rex v. Wren*, 222

21. In a notice of bail, the residence must be described in terms as that which he has occupied "for the

last six months;" as the Court will not infer it from the mere statement of his residence. *Holling's Bail*, 220

BAIL-BOND.

See REG. GEN. p. 446—BAIL, 19—
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NESS, 3.

1. In an application to stay proceedings on the bail-bond, the affidavit of merits, if made by an attorney, must describe him as the attorney to the defendant; and it is not sufficient to shew by other affidavits that there is an attorney of the same Christian and surname residing at the same place as that of which the deponent describes himself. *Bonnefor v. Russell*, 546

2. In staying proceedings on the bail-bond, it is not necessary to shew that a rule for the allowance of bail has been obtained, if it is sworn that the bail have been put in and justified. *Crossby v. Innes*, 566

3. The bail-bond cannot be required to stand as a security, if a trial has not been lost, at the time of moving to stay proceedings. *Ib.*

4. An application on the part of bail to stay proceedings on the bail-bond must now be grounded, in the Exchequer, on an affidavit shewing that the application is made at their expense, and for their only indemnity. *Key v. MacKyntire*, 463

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(LIEN OF), 2.

1. On an application to discharge

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a defendant out of custody on the ground that he has obtained his certificate under a fiat of bankruptcy, it should appear by affidavit that the certificate has been enrolled. *Oswald v. Williams*, 159

2. A bankrupt is entitled to his discharge from prison, notwithstanding he has neglected to plead his bankruptcy, and has given a cognovit payable at a time subsequent to that at which the plaintiff might have obtained judgment. *Ibid.*

BASTARD.

In order to charge the putative father of a bastard child with its support, under the 4 & 5 Will. 4, c. 76, s. 72, the application should be made at the next practicable sessions after the concurrence of the child's birth and the mother's chargeability in respect of it, unless such circumstances appear as justify the Court of Quarter Sessions in entertaining the application at a later period. *Rex v. The Justices of Oxfordshire*, 116

BELIEF.

See COSTS, 14.

BILL OF EXCHANGE.

See AFFIDAVIT (OF DEBT), 6—AMENDMENT, 3—BAIL, 8—DECLARATION, 1, 2, 4, 5—DEMURRER, 1—MISNOMER—PARTICULARS, 1, 8—PLEA, 6, 7, 8, 23—PLEA (FRIVOLOUS).

The circumstance of a bill having been given for accommodation, is not sufficient to cast upon the holder the onus of proving consideration, but the defendant must first make out a case of fraud or suspicion. *Mills v. Barber*, 77

BISHOP.

See LEVARI FACIAS, 1, 2.

CAPIAS.

789

BOND.

See PLEA, 5.

BREACH.

See VENIRE DE NOVO.

In an action by indorsee against indorser of a promissory note, the declaration alleged a promise to pay the note "according to the tenor and effect thereof," and assigned, as a breach, that the maker did not pay the note, nor *did* the defendant or any other person, although the note was duly presented when it became due, whereof the defendant had notice:—*Held*, that the promise was not incorrectly laid, and that the breach was sufficient after verdict. *Hedger v. Stevenson*, 771

CAPIAS.

See APPEARANCE, 4—SHERIFF'S RETURN—SUMMONS (WRIT OF), 4.

1. It is no objection to a writ of capias, that it is directed to the constable of "the Castle of Dover," instead of "Dover Castle," as in the schedule to the Uniformity of Process Act. *Frank v. James*, 723

2. If a defective copy of a writ of capias is served on a defendant, the Court will presume that a defective copy was delivered to the sheriff, and therefore it is not necessary for the defendant to shew that such a copy was delivered by the plaintiff to the sheriff. *Hodd v. Langridge*, 721

3. It is not a sufficient compliance with section 4 of the Uniformity of Process Act, as to delivering a copy of the capias to the defendant, to deliver it at seven o'clock in the evening, when the arrest took place at nine o'clock in the morning. *Shearman v. M'Knight*, 572

4. Where defendant was described in the capias as a clerk in the Army Pay Office, Somerset House, the

Court held the description insufficient, and set aside the writ. *Rolfe v. Swain*, 106

5. The actual or supposed residence of a defendant must be stated in a writ of capias. *Ward v. Watt*, 94

6. A capias containing no other description of the defendant than his surname, is irregular. *Margetson v. Tugghe*, 9

CARRIER.

See PLEA, 10.

CASE.

See PARTICULARS, 6, 9—TRESPASS.

CAUSE (SHEWING).

See AFFIDAVIT, 6—COSTS, 19.

CENTRAL CRIMINAL COURT.

See CERTIORARI, 5.

CERTIFICATE.

See ARBITRATION, 11—BANKRUPT, 1.

CERTIORARI.

See INFERIOR JURISDICTION.

1. In order to obtain a certiorari, it is not sufficient to serve the notice, under 13 Geo. 2, c. 15, on one justice present at the sessions making the order, and another justice of the same county not present. *Rex v. Rattislaw*, 539

2. It is not necessarily too late to object to the service of the notice after writ issued, although the consequence may be, that if the writ be quashed, it will be too late to sue out a fresh one. *Ib.*

3. It is competent for the parties in an appeal to object to the notice to justices previous to obtaining a certiorari. *Ib.*

COGNOVIT.

4. The rule for removing an indictment for non-repairs of a road from an inferior jurisdiction is nisi in the first instance. *Rex v. The Inhabitants of Leeds*, 123

5. The fact of an indictment being bad in point of law, is not a sufficient ground for granting a writ of certiorari to remove it from the Central Criminal Court. *Rex v. Templar*, 249

6. The writ of certiorari at the instance of a defendant is taken away by the 25 Geo. 2, c. 36, s. 10, in the case of an indictment for keeping a gaming-house. *The King v. Fox*, 242

7. In order to remove an indictment for obstructing a highway from the Quarter Sessions, it is not sufficient to state generally that difficulties in point of law may arise on the trial, but it is necessary to point out some specific difficulty. *Rex v. Jowl*, 435

CHECK.

See PLEAS (SEVERAL), 1—WARRANT (OF ATTORNEY), 1.

CHILD DESERTED.

Where an infant under two months old was deserted at the door of the Foundling Hospital, the Court issued a writ of mandamus in the first instance to the directors of the poor of the parish, constituted by a local act, commanding them to receive the child, although the application was made at the instance of a stranger, who took care of the child from humane motives. *Ex parte Foundling Hospital*, 722

COGNOVIT.

See APPEARANCE, 2—BANKRUPT, 2—PRISONER, 2.

Quære, if, since the new rules, the Court will, after the death of the defendant, permit judgment to be en-

tered on a *cognovit nunc pro tunc*.
Mann v. Lord Audley, 596

COMMON PLEAS.

See JURISDICTION, 3.

COMMISSIONER.

See AFFIDAVIT, 2, 5.

CONSIDERATION.

See PLEA, 26.

CONSOLIDATION RULE.

See NEW TRIAL, 1.

CONSPIRACY.

See ARBITRATION, 12.

CONTEMPT.

See ATTACHMENT — HABEAS CORPUS, 2.

CONTUMACE CAPIENDO.

See HABEAS CORPUS, 1, 3.

COPY.

See AFFIDAVIT OF SERVICE.

COPYHOLD.

See LIMITATIONS (STATUTE OF), 4—
 MANDAMUS.

CORPORATION.

See EJECTMENT, 23—PLEAS (SEVERAL), 3.

COSTS.

See ARBITRATION, 16—ATTORNEY, 3
 —ATTORNEY (LIEN OF)—BAIL, 2,
 3—EJECTMENT, 4—INTERPLEADER,
 2, 3, 4, 9—INQUIRY (WRIT OF)
 —JUDGE'S CERTIFICATE—JUDGMENT,
 2—MASTER'S DISCRETION—NEW
 ASSIGNMENT—NEW TRIAL, 2
 —NOLLE PROSEQUI, 1, 2—PEREMP-
 VOL. V.

TORY UNDERTAKING—PRINCIPAL
 AND AGENT—SUGGESTION, 1, 2—
 SUPERSEDEAS, 2—SUMMONS (WRIT
 OF), 1—VENUE, 2.

1. Where a distress is made under the authority of one local act, and the notice of distress states it to be made under another, and the plaintiff discontinues an action brought in respect of that distress, the mistake as to the act authorizing the distress does not interfere with the defendant's claim to treble costs under that act, in case of discontinuance, although the plaintiff may have adopted a form of action not contemplated by the protecting act. *Debney v. Corbett*, 704

2. The holder of a bill, who has given some value for it, is entitled to arrest for the whole amount of the bill, unless he is aware that no consideration passed between the prior parties to that amount; and therefore, though he recover less than the amount for which he arrested, the defendant is not entitled to costs under the 43 Geo. 3, c. 46. *Edwards v. Jones*, 585

3. Semble, that, where a party is arrested and goes to prison, he is arrested *and held to special bail* within the meaning of the 43 Geo. 3, c. 46, s. 3. *Ib.*

4. In trespass *quare clausum fregit*, the defendant pleaded, first, not guilty; secondly, the plaintiff not possessed; thirdly, right of way: verdict for him on the third issue, but for the plaintiff on the two first, with 1*s.* damages: the defendant, having substantially succeeded in the cause, is entitled to the *postea*. *Staley v. Long*, 616

5. Under 1 Reg. Gen., H. T. 2 Will. 4, s. 93, *interlocutory* costs may be set off against *final* costs in the same cause, without reference to the attorney's lien. *Holliday v. Laves*, 636

6. The costs to be allowed to a

mortgagee, where a mortgagor stays proceedings under the 7 Geo. 2, c. 20, in an ejectment brought for the recovery of the mortgaged premises, are to be taxed as between party and party, and not as between attorney and client. *Doe d. Capps v. Capps*, 634

7. If the issues found for the defendant, taken together, form an answer to the whole of the plaintiff's declaration, the defendant is entitled to the general costs of the cause, although some issues may have been found for the plaintiff, and damages assessed on them. *Probart v. Phillips*, 473

8. In trespass q. c. f., if the plaintiff obtains less damages than 40s. on issue joined on the plea of not guilty, he is not entitled to more costs than damages, without the Judge certifies under the 22 & 23 Car. 2, c. 9. *Dunnage v. Kemble*, 478

9. In an action of trespass, the defendant justified under a right of way to bring water and goods. The jury found for the plaintiff as to the goods, for the defendant, as to the water:—*Held*, that the defendant was entitled to the general costs of the cause, as he had substantially succeeded, and also to the costs of witnesses whose evidence applied to both issues. *Knight v. Woore*, 487

10. Under the 9 Geo. 4, c. 22, s. 63, a party entering up judgment for costs, pursuant to the Speaker's certificate, is not entitled to costs incidental to entering up the judgment. *Ranson v. Dundas*, 489

11. If an indictment against several defendants is removed by certiorari into the King's Bench, without the consent of one, he cannot be compelled to pay the costs of the trial, although he may have appeared and pleaded to the indictment, and been tried on it. *Rex v. Hassell*, 531

12. The Court has no power to

deprive the plaintiff of his costs in an action tried before the sheriff, where he has recovered a less sum than 40s. *Story v. Hodson*, 558

13. A statute enacted that if an action should be brought against any person for anything done in pursuance of that act, and the plaintiff become nonsuit, the defendants should recover treble costs. The statute having been repealed after the plaintiff became nonsuit, but before the time for signing judgment:—*Held*, that the defendants were not entitled to treble costs. *Charrington v. Meatheringham*, 464

14. The Court will not compel a third person to pay the costs of a defence on the mere allegation of "belief" that it has been carried on at his instance. *Blewitt v. Tregoning*, 405

15. Where the writ is issued for a sum above 20l., and before execution the plaintiff gives the defendant credit for a cross demand, which has not been pleaded, and thereby reduces the debt to a sum under 20l., the Master should tax the costs upon the reduced scale; *Patteson, J.*, dissentiente. *Savage v. Lipscombe*, 385

16. Where a juror is withdrawn and the cause referred, but no award made, and the cause being taken down again, the plaintiff succeeds, he is not entitled to the costs of the first attempt at trial. *Thomas v. Lewis*, 395

17. This court cannot grant the prosecutor of an indictment for obstructing a highway his costs at sessions, which have been rendered useless in consequence of the defendant obtaining a certiorari for the removal of the indictment, no notice of the writ having been given, until after defendant had given notice of trial, and the expenses had been incurred, although the writ had been issued long previously. *Rex v. Richard Higgins*, 375

COSTS.

18. Trespass at the suit of husband and wife, the declaration charging assault, battery, and false imprisonment; 1st plea, not guilty, the jury finding a farthing damages for the plaintiff, the Judge certified under the 43 Eliz. c. 6, s. 2: the Court would not set aside the certificate, although the verdict had been entered generally for the plaintiff on that issue on the postea. *Held*, also, that the defendant having in another plea traversed the marriage of the female plaintiff with the male plaintiff, he had not admitted the battery on the record, and therefore the Judge had jurisdiction to certify. *Wilson v. Lainson*, 339

19. A party who shews cause in the first instance is not entitled to costs. *Read v. Speer*, 330

20. The 7th rule of H. T. 4 Will. 4, has not deprived a Judge of the power of certifying, under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, where there are several issues. *Simpson v. Hurdis*, 304

21. A defendant is not entitled to treble costs under the 43 Eliz. c. 2, s. 19, where the plaintiff is nonsuited in an action for any thing done under the authority of that act. *Charington v. Meatheringham*, 313

22. On motions for costs under the 43 Geo. 3, c. 46, s. 3, the discretion of the Court is not to be governed by the amount of the verdict. *Graham v. Beaumont*, 49

23. On the trial of a right of way, in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants. The Court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count. In the rule no mention was made of costs, nor any reservation of the defendant's verdict on the first count:—*Held*, that the defendants were nevertheless entitled to the costs of the issues found for them on

COSTS (SECURITY FOR). 793

the first trial and not in contest on the second. *Bower v. Hill*, 183

24. To counts for money had and received, and on an account stated, the defendant pleaded non assumpsit, except as to 3*l.* 5*s.*; set-off, except as to 3*l.* 5*s.*; and payment of 3*l.* 5*s.* into Court. The plaintiff admitted the set-off, took the money out of Court, and declined further to prosecute his action:—*Held*, that the defendant was entitled to the costs of the two first issues. *Goodee v. Goldsmith*, 288

25. An attorney is not entitled to the costs of more than one letter sent before the commencement of the suit. *Capel v. Staines*, 770

26. On judgment of repleader or non obstante veredicto, neither party is entitled to costs; the rule of H. T. 2 Will. 4, s. 74, not affecting the law in that respect. *Plummer v. Lee*, 760

COSTS (BILL OF).

The rule of this Court, which requires a copy of the bill of costs, and affidavit of increase, to be delivered to the attorney on the other side one day previous to taxation, is imperative, unless waived by the other party. *Wilson v. Parkins*, 461

COSTS (SECURITY FOR).

See PAUPER, 1.

1. While proceedings on the bail-bond are pending, the defendant cannot obtain security for costs from the plaintiff in the original action, although bail has been perfected since the assignment of the bond. *Bonnefor v. Russell*, 555

2. The Court will compel a foreign potentate, plaintiff, to find security for costs, in a cause arising out of commercial transactions. *The Emperor of Brazil v. Robinson*, 522

3. It is not necessary to make a demand previously to moving for security for costs, unless it is intended

794 COUNTS (JOINDER OF).

to be part of the rule, that proceedings be stayed in the mean time. *Fountain v. Steele*, 331

4. It is not necessary for a defendant to shew the stage of the proceedings in order to obtain a rule nisi for security for costs. *Cole v. Beardy*, 161

5. The Court will not superadd to a rule for security for costs, the term of the defendant being at liberty to sign judgment as in case of a nonsuit, if the security should not be given within a limited time. *Kelly v. Brown*, 264

COSTS (SET-OFF).

See ATTORNEY (LIEN OF), 1, 2.

COUNSEL'S MISTAKE.

See INTEREST.

Where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the Court will not interfere to alter the amount of the verdict on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation. *Hilton v. Fowler*, 312

COUNSEL'S SIGNATURE.

See ERROR, 1—PLEA, 28.

COUNTERMAND (OF NOTICE OF TRIAL).

See RECORD (RE-SEALING).

Where a defendant is under terms to accept short notice of trial, there can be no countermand. *Doncaster v. Cardwell*, 582

COUNTS (JOINDER OF).

1. A count for work done by the plaintiff as administrator may be joined with counts on promises to the intestate. *Edwards v. Grace*, 302

2. A count, stating defendant to be indebted as administratrix, in re-

COUNTY COURT.

spect of the funeral of the intestate, cannot be joined with counts on promises by the intestate. *Hayter v. Moat*, 298

COUNTS (SEVERAL).

1. If one count in a declaration alleges the defendant to be jointly responsible with another, and a second charges him severally, the Court will order one of the counts to be struck out if the subject-matter does not appear to be distinct. *Cholmondeley v. Payne*, 688

2. The rule for striking out counts founded on the same matter of complaint should be drawn up on reading the declaration, or upon affidavit that they are identical. *Roy v. Bristow*, 452

3. The first count of a declaration stated, that E. J. was possessed of shares in a railway, and that defendant promised plaintiff that he was authorized by E. J. to sell the shares; whereas he was not so authorized. The second count stated defendant bargained with plaintiff to sell him the said shares, and promised to transfer them within a reasonable time: Semble, that both counts are not allowable. *Ib.*

COUNTY COURT.

See ABATEMENT (OF WRIT)—COURT OF REQUESTS.

1. It is not necessary, in order to give a county court jurisdiction, that the plaintiff should reside within the county. *Prichard v. Macgill*, 731

2. If the verdict of a jury, exceeding 40s., is reduced by the Court below that sum on a point of law, the defendant may obtain his double costs under the Middlesex County Court Act, if liable to be summoned under it. *Wells v. Langridge*, 509

3. The fact of the cause being tried on a writ of trial does not interfere with the defendant's claim. *Ib.*

COVERTURE.

4. The cause of action must arise, as well as the defendant reside, within the jurisdiction, in order to bring the case within the meaning of the statute.

Ib.

5. A debt reduced below 40s. by a set-off is not within the Middlesex County Court Act. *Jenkinson v. Norton*, 74

6. To bring a case within the 23 Geo. 2, c. 33, the cause of action must arise within the county of Middlesex. *Bailey v. Chitty*, 307

7. The Court will compel a sheriff to complete his entries of proceedings in a county court, and certify its practice, where, in his return to a writ of false judgment, only minutes of them have been transmitted. *Overton v. Swettenham*, 641

COURT OF REQUESTS.

See COUNTY COURT.

1. If a plaintiff by his indorsement on the writ claims an amount recoverable in a Court of Requests, the Court will not on payment of that sum relieve the defendant before trial, but will leave the defendant to apply to enter a suggestion. *King v. Myers*,

2. A suggestion may be entered on the roll to deprive the plaintiff of costs under the West Brixton Court of Requests Act, (46 Geo. 3, c. 88), when the debt is below 5*l.*; and it is not necessary that the plaintiff should be resident within the jurisdiction.

Hamley v. Hutton, 332

3. Defendant is not precluded from the benefit of the Court of Request Acts, by paying money into Court, or by consenting to a trial before the sheriff. *Turner v. Barnard*, 170

COVENANT.

See PARTICULARS, 2.

COVERTURE.

See PUIS DAREIN CONTINUANCE.

DECLARATION. 795

CRIM. CON.

See SMALL DEBTOR, 4—WITNESS (EXAMINATION ON INTERROGATORIES).

CRIMINAL.

See BAIL, 20—SHERIFF, 11.

CROSS DEMAND.

See COSTS, 15.

CROWN DEBTOR.

See LEGACY DUTY—VENUE, 4.

Where a crown debtor has died insolvent, a motion for a writ of *diem clausit extremum* is absolute in the first instance. *Rex v. Lord Crewe*, 156

CROWN LAND.

The Court will not grant a *mandamus* commanding the Commissioners of Woods and Forests to pay a poor rate, in respect of lands held by them under the crown. *Ex parte Reeve*, 668

DAMAGES.

See PLEA, 2, 14.

DEBT.

See JUDGMENT (INTERLOCUTORY)—PLEA, 1, 2, 3, 4, 5, 21.

DECLARATION.

See AMENDMENT, 3—PARTICULARS, 5—PLEA, 25—SHERIFF, 7—SLANDER—SLANDER (OF TITLE), 1, 2.

1. In an action by the indorsee against the drawer of a bill of exchange, the declaration must allege a promise to pay by the drawer. *Henry v. Burbidge*, 484

2. In an action by the drawer against the acceptor of a bill of exchange, the declaration, after setting out the bill, which was payable at four

months, stated, *which period has now elapsed*:—Held sufficient, on demurrer. *Owen v. Walters*, 324

3. It is not necessary to shew, on the face of a declaration, that the cause of action accrued before the writ issued. *Id.*

4. The rule of T. T. 1 Will. 4, as to the averment of the promise where there is a count against the maker of a note, or the acceptor of a bill, and also the common counts, only applies to the latter. *Wainwright v. Johnson*, 317

5. In indebitatus assumpsit, the statement of the "promise" is a material allegation, and the omission of it is not cured by verdict, but is ground for arresting the judgment. The defect may, however, be cured by any plea which admits a promise. *Hayter v. Eleanor Moat*, 298

6. Where the plaintiff's declaration is delivered on the day after that on which it bears date, contrary to 1 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), it is an irregularity, which is waived by delaying to come to the Court from the 26th of October to the 9th of November. *Newnham v. Hanny*, 259

DECLARATION (DEMAND OF).

Only one demand of declaration is necessary; and therefore, if the plaintiff obtains further time to declare, the defendant will be entitled to sign a non-pros. at the expiration of the last order for time. *Teulon v. Gant*, 153

DECLARATION (NOTICE OF).

The notice of declaration must be served previously to filing a rule to plead. *Bennett v. Smith*, 353

DEED.

See WITNESS, 1.

DEMURRER.

DEFENDANTS (SEVERAL).

See COSTS, 11.

DEMURRER.

See DECLARATION, 2—QUO MINUS—SHERIFF, 2—TROVER.

1. In an action by indorsee against drawer of bills of exchange, defendant pleaded that J. E. made and indorsed the bills in the name of defendant without any authority from him. Replication, that the bills were not made or indorsed by the said J. E. The defendant having demurred to this replication, the Court refused to set aside the demurrer, and allow the plaintiff to sign judgment as for want of a plea. *Walker v. Catley*, 592

2. If a demurrer to a declaration specifies several grounds of demurrer in the margin, it is a sufficient compliance with 2 Reg. Gen. H. T. 4 Will. 4, (Practice Rules), without specifying on which of those grounds the defendant intends to rely. *Whitmore v. Nicholls*, 521

3. The second rule of H. T. 4 Will. 4, applies as well to special as to general demurrers. *Lyndhurst v. Pound*, 459

4. Where a demurrer to a declaration is too large, the Court will give judgment for the plaintiff. *Semble*, in such a case, the plaintiff should enter a nolle prosequi as to the counts which are bad, or the defendant may bring a writ of error. *Wainwright v. Johnson*, 317

5. A reference in the margin of a demurrer to the causes specially set out, is a sufficient compliance with R. H. T. 4 Will. 4. *Berridge v. Priestly*, 306

6. Plaintiff declared for work as an attorney and solicitor. Defendant pleaded two pleas, only answering the plaintiff's claim as attorney; the plaintiff demurred, referring in the margin of his demurrer to the causes

DISCONTINUANCE.

assigned. A judge having ordered the demurrer to be set aside, the Court rescinded the order. *Ib.*

7. Where a defendant obtains time to plead on the terms of pleading issuably, he is not thereby precluded from demurring specially, for good cause, to the replication. *Barker v. Gleadow,* 134

DEPONENT (ADDITION OF).

See AFFIDAVIT, 7, 8, 9—AFFIDAVIT (OF DEBT), 4—BAIL, 1.

DEPONENTS (SEVERAL).

See AFFIDAVIT, 1.

DEPOSIT (FOR BAIL).

Where a defendant has deposited money in Court, pursuant to 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit, and he succeeds, the rule for taking the money out of Court is nisi in the first instance. *Lover v. Tolmin,* 388

DETAINER.

Where a prisoner is detained in prison upon several detainers, the Court will not inquire into the validity of a subsequent warrant committing him to another prison, but on which he has not been taken to that other prison. *Ex parte Garcia,* 352

DEVASTAVIT.

See EXECUTOR, 1.

DISCONTINUANCE.

See COSTS, 1.

Where a defendant has become bankrupt, the plaintiff cannot discontinue upon the terms of the 59th section of the Bankrupt Act, unless he has either proved his debt before the commissioners, or had his claim entered on the proceedings under the fiat. *Augarde v. Thompson,* 762

DISTRINGAS. 797

DISTRESS (NOTICE OF).

See COSTS, 1.

DISTRINGAS.

See APPEARANCE, 3.

1. After the expiration of four calendar months from the date of a summons, a distringas cannot be issued in respect of the former writ. *Abbots v. Kelly,* 478

2. A declaration by the defendant, that he will keep out of the way to avoid being served, does not waive the necessity of complying with the practice of making three calls, &c. in order to obtain a distringas. *Clayton v. Marsham,* 542

3. Under special circumstances, the Court will allow a writ of distringas, to compel an appearance, to be issued against a defendant, although his residence cannot be discovered, the usual service of the writ of summons by calls and appointments having been effected at his two last known places of abode, and on an agent for the receipt of his rents, who stated himself to be in communication with his principal. *Grindley v. Thorn,* 544

4. The Court will not grant a writ of distringas, for the purpose of compelling an appearance, where there has only been a service of the writ of summons on an agent of the defendant. *Grindley v. Thorn,* 383

5. If a Judge at chambers order a distringas to issue, the Court will not afterwards interfere to set the Judge's order aside, although three calls and two appointments may not have been made; but the distringas itself will be set aside for not being indorsed with the amount claimed by the plaintiff. *Gale v. Winks,* 348

6. It is indispensably necessary, in order to obtain a distringas, that the hour should be mentioned at the time of making the appointments. *Atkinson v. Clean,* 252

7. A *distringas*, with a view to outlawry, may issue in continuation of writs previously sued out to save the Statute of Limitations. *Ray v. Dow*, 310

DOCUMENT (DESCRIPTION OF).

Where a rule is drawn up on reading a particular document, it is sufficient to describe it as a "paper writing," without stating the nature of the document. *Platt v. Hall*, 583

DRAWER.

See AFFIDAVIT (OF DEBT), 8—BAIL, 8—DECLARATION, 1, 2, 3, 5—PLEA, 6.

ECCLESIASTICAL JURISDICTION.

See HABEAS CORPUS, 1, 3—OYER—PROHIBITION, 1, 2, 3.

EJECTMENT.

See LANDLORD AND TENANT, 1, 2, 3—SMALL DEBTOR, 5.

1. In order to obtain judgment against the casual ejector, it is necessary that a service should be shewn on the "tenant in possession;" a service on the last person in possession is insufficient, although there may be a difficulty in ascertaining who is the tenant in possession. *Doe d. Fraser v. Roe*, 720

2. Service on the servant of the tenant in possession, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, is sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Messer v. Roe*, 716

3. If the name of one tenant is improperly spelled in the notice served on another, it is immaterial for the service on the latter. *Ib.*

4. In the Exchequer, there is no

rule requiring an appearance to be entered for the casual ejector, previously to signing judgment against him; and if such appearance be entered, the costs thereof will not be allowed on taxation. *Doe d. Morgan v. Roe*, 605

5. If, in a country ejectment, the notice is to appear in one term, but the application for judgment is not until the following, it is a matter of course to grant the rule. *Doe d. Wiggs v. Roe*, 662

6. Service in ejectment. *Doe d. Symes v. Roe*, 667

7. If the date of the notice in declaration in ejectment conveys sufficient information to the tenant, the title is immaterial. *Doe d. Evans v. Roe*, 508

8. Where a declaration in ejectment is served, with two notices annexed, one requiring the appearance of the defendant, and the other that he should enter into recognizances on his appearance, the latter may be treated as surplusage. *Doe d. Roberts v. Roe*, 508

9. Where tenants lock themselves up in the premises sought to be recovered, and access cannot be had to them, it is a sufficient service for a rule nisi to put the declaration under the door, and explain it aloud outside. *Doe d. Lord Summers v. Roe*, 552

10. Where the tenant goes abroad, and it does not appear when he will return, the Court will grant a rule nisi for judgment against the casual ejector, when the service has been effected at the premises, on a servant of the tenant. *Doe d. Mather v. Roe*, 552

11. Where there is reason to believe that the person served is the tenant in possession, although he denies it, the Court will allow judgment to be signed. *Doe d. Hunter v. Roe*, 553

12. Where the declaration in eject-

ment contains both joint and several demises, it is sufficient to intitle the affidavit on motion for judgment as being on the several demises of all the lessors of the plaintiff, without noticing which are joint and which several. *Doe d. Barles v. Roe*, 447

13. Where property in possession of parish overseers is sought to be recovered in ejectment, service on one is not sufficient to obtain judgment against all. *Doe d. Weeks v. Roe*, 405

14. A declaration in ejectment dated the 8th instead of the 7th of Will. 4, is irregular; but if, from the date of the notice, the tenant must be aware of the term in which he is to appear, the defect is cured. *Doe d. Wills v. Roe*, 380

15. Where a surviving joint tenant, who is the sole person in possession, has been served, the Court will only allow judgment to be signed against him, although the name of the deceased joint tenant has been introduced into the proceedings. *Doe d. Hewson v. Roe*, 404

16. In an affidavit of service of a declaration in ejectment, the word "served" is not indispensably necessary, if it appears from the affidavit that it has been duly served. *Doe d. Jenkinson v. Roe*, 155

17. A declaration in ejectment intitled "6 Will. 4," instead of "7 Will. 4," is irregular. *Doe d. Gonland v. Roe*, 273

18. If the service in ejectment is quite regular, the papers should be at once taken to the rule office, without applying to the Court. *Doe d. Welch v. Roe*, 271

19. The service of a declaration in ejectment, the notice of which is directed to D. S., is not good on E. B., although E. B. is tenant of part of the premises. *Doe d. Smith v. Roe*, 254

20. In order to obtain judgment against the casual ejector, it is neces-

sary to swear to a service on the "tenant in possession;" it is not sufficient to swear to service on a person who appears, from facts stated in the affidavit, to be in point of law the tenant in possession. *Doe d. Jones v. Roe*, 226

21. An acknowledgment by a tenant in possession after the commencement of the term, that the declaration has come to his hands, is not sufficient even for a rule nisi for judgment against the casual ejector, unless the acknowledgment is that he received it before term, although the wife acknowledges it came to her hands on the day before term. *Doe d. Finch v. Roe*, 225

22. Service in ejectment. *Doe d. Watts v. Roe*, 149

23. Service of a declaration in ejectment on the clerk of an incorporated company, (not empowered to sue and be sued in the name of their clerk), on a portion of the premises, but who was not resident there, is sufficient for a rule nisi. *Doe d. Ross v. Roe*, 147

24. Service of a declaration in ejectment on a servant in care of the premises is insufficient to obtain a rule in the first instance; and in order to obtain a rule nisi, some probable ground must be shewn for believing that the tenant has notice of the service. *Doe d. Read v. Roe*, 85

ERROR.

See DEMURRER, 4.

1. The common joinder in error does not require counsel's signature. *Grant v. Smith*, 107

2. It is no ground of error coram vobis that the writs of venire facias and distringas juratores are returned with only one panel annexed to both. *Green v. Smith*, 174

3. No proceedings can be taken on a judgment after writ of error sued

out, and note of allowance served. If the writ is improperly sued out, the proper course is to move to set it aside. *Marston v. Halls*, 292

4. A writ of error coram vobis is a supersedeas from the time of notice that it is sued out, and not from the time of allowance only. *Levi v. Price*, 775

5. The 6 Geo. 4, c. 96, s. 1, requiring bail in error, does not apply to error in fact. 16.

ESTOPPEL.

See SHERIFF, 1.

EVIDENCE.

See NONSUIT—WRIT.

EXCEPTION.

See BAIL, 5.

EXECUTION.

See PRISONER, 2—SUPERSEDEAS, 3.

1. Where a defendant has been arrested on a ca. sa., to execute which the sheriff's officer has broken an outer door, the Court will discharge him out of custody on a summary application. *Hodgson v. Topping*, 410

2. The fact of the damages and costs together amounting to more than the sum laid in the declaration is no ground for setting aside the ca. sa. in that action, or subsequent proceedings against the bail. *Kempeneers v. Holding*, 374

3. The costs having been taxed and an allocatur signed upon a rule, which gave the plaintiff leave to enter up judgment for debt and costs in an inferior Court, to be taxed by the prothonotary, the plaintiff sued out a writ of fi. fa., and levied thereunder the debt and costs. The Court ordered it to be set aside, no judgment having been entered up or signed to warrant it. *Finch v. Brook*, 59

FINE AND RECOVERY.

4. The Court of Exchequer will not discharge a defendant out of custody on account of the omission of his residence in the writ of ca. sa. *Strong v. Dickenson*, 99

EXECUTION (SPEEDY).

Where a Judge has made an order for speedy execution, under 1 Will. 4, c. 7, s. 4, and the defendant at once pays over the sum in question, and a motion for a new trial is afterwards made, the Court will not order the plaintiff to pay the sum he has received into court during the pendency of that rule. *Morton v. Burn*, 421

EXECUTOR.

See PLEA, 25, 28—PROHIBITION, 3—SHERIFF, 8.

1. On a scire fieri inquiry, the judgment against the executors on a false plea is sufficient evidence of a devastavit. *Palmer v. Waller*, 172

2. A defendant executor does not preclude himself, by referring a cause, from availing himself of a plea of judgment recovered puis darrein continuance, while the reference was pending, although it appears from affidavits that he has a certain amount of assets in his hands. *Alder v. Park*, 16

EX PARTE APPLICATION.

See ARBITRATION, 13.

FELONY.

See BAIL, 20.

FINE AND RECOVERY.

See ATTORNEY (BILL OF), 1—ATTORNEY (LIEN OF), 3—MANDAMUS.

Affidavit verifying commissioners' certificate under Fines and Recoveries Act, may in some cases be made by

HABEAS CORPUS.

one of the commissioners, being also the attorney for taking the acknowledgment. *Re Scholefield*, 368

FOREIGN POTENTATE.

See COSTS (SECURITY FOR), 2.

FOREIGN TRIBUNAL.

See HABEAS CORPUS, 2.

FOUNDLING HOSPITAL.

See CHILD DESERTED.

FRAUD.

See BILL OF EXCHANGE.

GAMING DEBT.

See PLEA, 26.

GAMING HOUSE.

See CERTIORARI, 6.

GENERAL ISSUE.

See PLEA, 9, 12, 16, 17, 21, 22, 24—PLEAS (SEVERAL), 3.

GREAT SESSIONS.

See JURISDICTION, 1.

HABEAS CORPUS.

See PRISONER, 1.

1. On applying to quash a writ de contumace capiendo, under which a defendant is in custody, it is not necessary to move for a writ of habeas corpus. *Rex v. Hewitt*, 646

2. Where a writ of habeas corpus has been served on a party in France, and which has not been obeyed, the Court will not grant a rule absolute in the first instance for an attachment on the ground of his disobedience, although the English proceeding has been recognised and ordered to be obeyed by the French tribunals; nor

INDORSEMENT (ON WRIT). 801

will the Court grant its warrant to apprehend the defendant for his contempt, under the 56 Geo. 3, c. 100, s. 2, it appearing that the person in question was confined in France. *Ex parte Wyatt*, 389

3. The Court of King's Bench, it seems, will not grant a ha. cor. to remove a defendant out of custody, on a writ de contumace cap., for the purpose of doing penance before an Ecclesiastical Court, although the Lord Chancellor will. *Ex parte Strong*, 213

4. A writ of habeas corpus lies to bring up a plaintiff already in custody, in order to charge him in execution for costs of a nonsuit: and no affidavit is necessary to warrant the issuing of the habeas corpus: nor is it necessary that any day certain for the bringing up of the party should be inserted, or that the number roll of judgment should appear therein. *Furnival v. Stringer*, 195

HIGHWAY.

See COSTS, 17.

The inhabitants of a parish cannot be discharged from an indictment for the non-repair of a highway, until it is ascertained whether the repairs effected will stand during a winter. *Rex v. Inhabitants of Witney*, 728

ILLEGALITY.

See PLEA, 26.

IMPARLANCE.

See PLEAD (NOTICE TO).

INDICTMENT.

See COSTS, 11, 17—HIGHWAY.

INDORSEMENT (ON WRIT).

See ATTORNEY, 3—COURT OF REQUESTS, 1—DISTINGAS, 5—SUMMONS (WRIT OF), 3.

INDORSEE.

See AFFIDAVIT (OF DEBT), 4, 8—
DECLARATION, 1—PLEA, 6, 7, 26.

INDORSER.

See PLEA, 6.

INFERIOR JURISDICTION.

Where it appears, by the declaration in a cause instituted in an inferior jurisdiction, that the sum claimed by the plaintiff is exactly 20*l.*, it is not necessary to enter into the recognizance required by the 19 Geo. 3, c. 70, §. 6, and the 7 & 8 Geo. 4, c. 71, §. 6, in order to remove it into a superior court. *Brady v. Veeres*, 416

INJUNCTION.

See ARREST, 2.

INQUIRY (WRIT OF).

See JURY.

Upon writs of inquiry before the sheriff, where the damages are under 20*l.*, the costs are taxed on the same scale as upon trials before the sheriff. *Hooppell v. Leigh*, 40

INSOLVENT.

See BAIL, 7—JUDGMENT AS IN CASE OF A NONSUIT, 10—PAUPER, 1.

The mortgagee of an insolvent cannot, in respect of his interest, oppose an application by the lessor of the plaintiff to issue execution in an ejectment, the plaintiff having been nonsuited for want of confessing lease, entry, and ouster by the insolvent. *Doe d. Marquess Westminster v. Suffolk*, 660

2. A defendant who had taken the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, induced one of his creditors to give him fresh credit by executing a warrant of attorney for the old and the new debt; the Court

INTERPLEADER.

set aside a judgment signed on that warrant to the extent of the old debt. *Smith v. Alexander*, 13

INSPECTION OF DEED.

See OYER.

INTEREST.

Where, in an action for principal and interest on a mortgage deed, which was undefended, the plaintiff's counsel took a verdict for principal only, omitting to include the interest, the Court refused to increase the amount of the verdict by adding the interest. *Baker v. Brown*, 313

INTERNATIONAL LAW.

See HABEAS CORPUS, 2.

INTERPLEADER.

See SHERIFF, 4.

1. Where the seizure was on the 25th of November, and the sheriff received notice on the 28th:—*Held*, that he should have applied to the Court for relief, so as to have enabled the parties to have shewn cause in the following term. *Beale v. Overton*, 599

2. If the sheriff is guilty of laches in making his application, he must pay the costs of both parties. *Ib.*

3. On an application under the first section of the Interpleader Act, if the claimant does not appear, the Court will not order him to pay the costs of applying to the Court, or such costs to be paid out of the fund in dispute. *Lambert v. Cooper*, 547

4. On a sheriff's rule under the Interpleader Act, he is not entitled to costs, notwithstanding the execution creditor fails to appear. *Beswick v. Thomas*, 458

5. The Court has no power, under the Interpleader Act, to dispose summarily of the matter in dispute between the parties, who appear on the

INTERROGATORY.

sheriff's rule, without the consent of both plaintiff and claimant. *Curlewis v. Pocock*, 381

6. Where, on an interpleader rule, neither the plaintiff nor claimant appears, the Court will discharge the sheriff from actions by either of those parties, and permit him to levy his poundage and expenses, and abandon the remainder of the levy. *Eveleigh v. Salisbury*, 369

7. The Court will not interfere to relieve the sheriff under the Interpleader Act where the proceeds of the levy have been paid over to the execution creditor, although the sheriff may be willing to bring a similar amount into Court. *Inland v. Bushell*, 147

8. The Court has no jurisdiction, under the first section of the Interpleader Act, to interfere in an action where the declaration contains a count in case as well as a count in trover. *Lawrence v. Mathews*, 149

9. If an order for an issue is made by consent at chambers by a single Judge for the relief of the sheriff, under s. 6 of the Interpleader Act, it is necessary for the successful party to come to the Court to obtain an order for his costs. *Matthews v. Sims*, 234

10. Where a plaintiff in an issue directed under the Interpleader Act does not proceed to the trial of it, the Court will not permit another person's name to be substituted, without making the originally appointed plaintiff a party to the rule. *Lydal v. Bidde*, 244

INTERROGATORY.

See WITNESS (EXAMINATION OF, ON INTERROGATORIES).

1. It is not necessary, on applying for a rule nisi under 1 Will. 4, c. 22, s. 4, for a commission to examine witnesses out of the jurisdiction, to state the names of the examiners. *Fearon v. White*, 713

JUDGE (CERTIFICATE OF). 808

2. Under s. 4 of 1 Will. 4, c. 22, the Court will allow witnesses to be cross-examined vivâ voce, by a commission executed abroad, when the application seems reasonable. *Pole v. Rogers*, 632

INTRUSION.

See VENUE, 4.

INVENTORY.

See PROHIBITION, 3.

IRREGULARITY.

See DECLARATION, 6—EXECUTION, 1—LACHES, 1—TAXATION, 8.

ISSUE (FORM OF).

See VARIANCE 3—WRIT (OF TRIAL) 8.

In the issue, the date of the writ of summons was wrongly stated; the word defendant was used instead of defendants, and the award of venire was to the *then* sheriff:—*Held*, that these errors were no ground for setting aside the issue, but that the proper course was to apply to a Judge at chambers to amend it at the plaintiff's cost. *Ikin v. Plevin*, 594

ISSUE (IMMATERIAL).

See ARBITRATION, 19.

ISSUES (SEVERAL).

See ARBITRATION, 5, 10, 19—COSTS, 4, 7, 9, 18, 20, 23, 24—VERDICT.

JUDGE (CERTIFICATE OF).

See COSTS, 8, 18, 20—WRIT OF TRIAL, 5.

Where the verdict is under 20*l.*, a certificate of the cause being fit to be tried before a superior judge may be given at any time. *Ivey v. Young*, 450

804 JUDGMENT (ARREST OF).

JUDGE (ORDER OF).

See ATTACHMENT, 3, 6.

1. A rule to make a Judge's order a rule of court for judgment as in case of a nonsuit, is absolute in the first instance; but, although notice shall have been given to the opposite party, it cannot be made a part of the same rule, that judgment shall be entered up, and execution issued. *Doe d. Moore v. Savage*, 507

2. A motion to set aside a Judge's order can only be made on producing a copy of the order. *Hoby v. Pritchard*, 300

JUDGE (POWER OF).

See TAXATION, 2.

The decision of a judge at chambers may be reviewed by a single judge sitting in the Bail Court. *King v. Myers*, 686

JUDGMENT.

See COSTS, 13—LACHES, 1.

1. As against a prisoner, a final judgment is complete at the time of signing, without carrying in the roll. *Colbron v. Hall*, 534

2. Where a plaintiff has signed an interlocutory judgment for want of a plea, too soon, and the plaintiff gives notice of his intention to abandon it, but does not actually strike it out, the defendant need not come to the Court to set it aside; but the Court discharged a rule for that purpose without costs. *Robinson v. Stoddart*, 266

JUDGMENT (ARREST OF).

See DECLARATION, 5—PLEA, 13—SLANDER OF TITLE—VENIRE DE NOVO.

1. In assumpsit for money lent, the writ issued on the 20th February; in the declaration, which was delivered

JUDGMENT, &c.

on the 8th March, the cause of action was alleged to have accrued on the 27th February:—*Held*, no ground for arresting the judgment. *Arnold v. Arnold*, 203

2. Where some of the counts of a declaration are good, and others defective, and separate damages have been assessed on each count, the Court will only arrest the judgment on the defective counts: aliter, if the verdict was general. *Hayter v. Moat*, 298

3. Where judgment was arrested on account of a defect in the declaration, and the plaintiff's attorney, on the evening of the same day, served the defendant's attorney with a copy of a writ of summons for the same claim on which the judgment was arrested, the Court made a rule absolute for setting aside the writ with costs, on payment of the money due within four-and-twenty hours. *Hayter v. Moat*, 329

JUDGMENT (AS IN CASE OF A NONSUIT).

See COSTS (SECURITY FOR), 5—JUDGE (ORDER OF), 1—PEREMPTORY UNDERTAKING.

1. Where issue was joined the day after Michaelmas Term:—*Held*, that a motion for judgment as in case of a nonsuit, in Easter Term, was too soon. *Wyatt v. Howell*, 585

2. A plaintiff having withdrawn the record in consequence of the absence of a witness, on a subsequent day gave fresh notice of trial. Prior to the day of trial under this second notice, the defendant moved for judgment as in case of a nonsuit, having given one day's previous notice only. The plaintiff tried his cause as undefended, and obtained a verdict:—*Held*, that the verdict was an answer to the motion; but the Court, on discharging the rule, set aside the ver-

dict on payment of the costs thereof, and the costs of the rule, the plaintiff giving a peremptory undertaking.

Jones v. Homs, 600

3. Issue joined in a country cause in Easter Vacation; no notice of trial for the Summer Assizes; judgment as in case of a nonsuit may be moved for in the following Michaelmas Term.

Robinson v. Taylor, 518

4. Issue joined, in a town cause, in Hilary vacation, on the 2nd February, and an order obtained on the 3rd to try before the sheriff:—*Held*, that it was too early to apply for judgment as in case of a nonsuit in the following Easter Term, although several sheriff's court days had passed since the order was obtained. *Stacey v. Jeffrys*,

524

5. Where issue is joined in a London cause in Trinity vacation, and no notice of trial given, it is too early to move for judgment as in case of a nonsuit, in the following Hilary Term, although an order had been obtained for trying before the sheriff. *Fox v. M'Culloch*,

526

6. If a plaintiff gives notice of trial for the third term after issue joined, and countermands that notice, it is too early to move for judgment as in case of a nonsuit, in that term. *Gripper v. Lord Templemore*,

408

7. If a plaintiff has once taken his cause down to trial, although a new trial may be granted, and he has given fresh notice, pursuant to which he does not proceed, the defendant is not entitled to judgment as in case of a nonsuit. *Hawley v. Sherly*,

393

8. Where a plaintiff gave notice of trial, and the defendant afterwards signed judgment of non pros. for not entering the issue pursuant to a rule for that purpose, it is a sufficient answer to a rule for a judgment as in case of a nonsuit, that the time for proceeding to trial expired pending a rule for setting aside the non pros.

Howell v. Jacobs, 394

9. Where a plaintiff has given a peremptory undertaking to try at a particular assize, and he is prevented from fulfilling it by the sudden illness of the Judge, that is not a sufficient excuse to prevent the defendant from obtaining judgment as in case of a nonsuit absolute. *Ward v. Turner*, 22

10. It is a sufficient excuse for not proceeding to trial, that the defendant has, since the commencement of the action, taken the benefit of the Insolvent Debtors' Act, and in such case the Court will discharge a rule for judgment as in case of a nonsuit, with costs, unless the defendant consent to a stet processus. *Smith v. Badcock*,

91

11. It is a sufficient answer to a motion for judgment as in case of a nonsuit, that the defendant has taken proceedings against the plaintiff in the Court of Chancery, and thereby rendered it needless to proceed to trial.

Partridge v. Salter, 68

12. If a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the Court, and he afterwards gives another notice of trial for a later sitting, but which is still within due time, the defendant is not entitled to judgment as in case of a nonsuit, although he has not proceeded to trial under his first notice, nor countermanded it. *Ranger v. Bligh*,

235

13. Where money had been paid into Court in satisfaction of the cause of action, and there was a replication of damages ultra, and the plaintiff had not proceeded to trial pursuant to a peremptory undertaking, the Court permitted the plaintiff to accept the money paid into Court upon paying the defendant the costs subsequent to such payment. *Kelly v. Flint*, 293

14. Where issue was joined after Easter Term, and it did not appear whether it was a country or a town cause, a motion for judgment as in case of a nonsuit, in Michaelmas Term,

was held too early. *Heale v. Curtis*, 294

15. A similiter intitled in a wrong court is a nullity; and therefore in such case there can be no issue joined to warrant a motion for judgment as in case of a nonsuit. *Ray v. Good*, 295

16. It is no answer to a rule for judgment as in case of a nonsuit, that the proceedings were commenced against the defendant without the plaintiff's authority. *Barber v. Wilkins*, 305

JUDGMENT (FOR WANT OF A PLEA).

See DEMURRER, 1—PLEAD (NOTICE TO).

1. Where there has been a demand of plea at the time of declaration delivered, the plaintiff may sign judgment for want of a plea in the morning of the day after the time for pleading expires. *Blundell v. Hanson*, 457

2. A plaintiff is not entitled to sign judgment for want of a plea, until the time for pleading has expired, although none but irregular pleas may have been delivered by the defendant. *Smith v. Rathbone*, 401

JUDGMENT (INTERLOCUTORY).

It is no objection to an *interlocutory* judgment, that it is signed in an action of debt. *Mackenzie v. Gayford*, 408

JUDGMENT (NON OBSTANTE VEREDICTO).

See COSTS, 26—REPLEADER, 1.

JUDGMENT (RECOVERED).

See EXECUTOR, 2.

JURISDICTION.

See COURT OF REQUESTS, 2—RIGHT (PETITION OF), 1.

1. The Court of K. B. has no jurisdiction over an attorney of the Great Sessions of Wales for misconduct while acting in that character, notwithstanding the provisions of the 11 Geo. 4 & 1 Will. 4, c. 70, and his having become an attorney of the K. B. *In re Williams*, 236

2. The Court in banc has no jurisdiction to amend an order of *Nisi Prius* until it has been made a rule of Court. *Cranch v. Tregoning*, 230

3. The Court of C. P. cannot exercise a summary jurisdiction over a party who is not one of its own officers, although the matter be pending here. *Sharp v. Hawker*, 186

JURISDICTION (EXCESS OF).

See ARBITRATION, 1, 2, 9.

JURY.

Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the Court will direct the sheriff to summon a jury to be taken from the special jury book. *Price v. Williams*, 160

JURY (PROCESS).

See ARBITRATION, 11.

JUSTIFICATION.

See PLEADING.

See AFFIDAVIT (OF DEBT), 5—ARBITRATION, 3, 4, 11, 15—ATTACHMENT, 5—ATTORNEY AND CLIENT—INTEREST—INTERPLEADER, 2, 7—OUTLAWRY, 1—PAUPER, 2—SUPERSEDEAS, 4—VENUE, 1.

1. Judgment signed on the 23rd;

LACHES.

summons to set aside on the 25th; dismissed on the 26th; application to Court not too late on the 29th. *King v. Myers*, 686

2. If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the Court as soon as such steps are taken by the former as shew his intention to proceed on the appearance. *Strange v. Freeman*, 407

3. If a plaintiff seeks to set aside an interlocutory judgment for irregularity, he must come to the Court within a reasonable time from his knowing that it is signed, and cannot wait until a rule to compute is served. *Grant v. Flower*, 419

LEGACY DUTY.

Upon making absolute a rule calling on executors to account for legacy duty, the Court ordered, that in future it should form part of such rules, that "if, upon the delivery of the account, there should be found to be any duty payable to his Majesty, that the executor should pay the costs of the Crown, to be taxed in the usual manner." *In re Moses Robinson*, 609

LANDLORD AND TENANT.

1. In moving for the ordinary landlord's rule, under the 1 Geo. 4, c. 87, s. 1, the affidavit in support of the application must have the plaintiff's lessor's name in its title. *Doe d. Watson v. Roe*, 389

2. If a landlord applies to the Court under the 1 Geo. 4, c. 87, s. 1, the instrument constituting the tenancy must be stamped at the time of moving. It is not sufficient, to stamp it after the rule is obtained, and before shewing cause. The motion cannot be made on a copy only. *Doe d. Caulfield v. Roe*, 365

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3. It is immaterial in an application under the 1 Geo. 4, c. 87, s. 1, that the lessor of the plaintiff is the original lessee, and the tenant his sub-lessee. *Doe d. Watts v. Roe*, 213

LETTER (COSTS OF).

See Costs, 25.

LEVARI FACIAS.

1. It is a good objection to a rule requiring a bishop to make his return to a levari facias, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served upon the bishop. *Phillips v. Berkeley*, 279

2. A bishop cannot be required to make a return of what has been levied under a levari facias, previous to his coming into office. *Ib.*

LIBEL.

See PLEA, 11.

LIFE (PROOF OF).

See ATTORNEY (WARRANT OF).

LIMITATIONS (STATUTE OF).

See DISTINGAS, 7—*SUMMONS (WRIT OF)*, 4.

1. An annuitant under a will must, since the passing of 3 & 4 Will. 4, c. 27, have recourse to distress or action within twenty years from the testator's death. *James v. Salter*, 496

2. "I will see Davis, or write to him: I have no doubt he has paid it: if by chance he has not paid it, it is very fit it should be," in a letter, is not a sufficient acknowledgment of a debt under the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations. *Poynder v. Bluck*, 570

3. The fact of its appearing by the plaintiff's particulars that the debt is barred by the Statute of Limitations,

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808 LIMITATIONS (STAT. OF).

is not a ground for discharging a defendant out of custody on meane process. *Merceron v. Merceron*, 271

4. Where it is clear, that, by the provisions of the 3 & 4 Will. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the Court will not compel the lord by mandamus to admit him. *Rex v. The Lord of the Manor of Agardsley*, 19

LIVING (PROOF OF).

See ATTORNEY (WARRANT OF).

LORDS' ACT.

See SMALL DEBTOR, 6.

MAGISTRATE.

See CERTIORARI, 1, 2.

MAKER.

See AFFIDAVIT (OF DEBT), 4—DECLARATION, 4.

MANDAMUS.

See CHILD (DESERVED)—CROWN LAND—LIMITATIONS (STATUTE OF), 4.

In applying for a mandamus to the steward of a manor to enrol a deed of disposition, pursuant to 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit. *Crosby v. Fortescue*, 273

MANDATE.

Where a ca. sa. without a non omittas clause has been directed to the sheriff, and he has issued his mandate to the bailiff of a liberty in which the defendant resides, and after obtaining time to return the writ, he has returned cepi corpus in due time, the bailiff cannot be compelled to return the mandate, although he has also obtained time to return it. *Jackson v. Taylor*, 140

MARRIED WOMAN.

See ATTORNEY (BILL OF), 1.

MERITS (AFFIDAVIT OF).

MARRIAGE.

See ABATEMENT (OF WRIT).

MARRIAGE (PROMISE OF).

See SATISFACTION (ON RECORD).

MARSHAL.

See SUPERSEDEAS, 1.

MASTER'S DISCRETION.

See ARBITRATION, 14, 18.

1. The Court will interfere with the discretion of the Master as to the number of counsel he allows on taxation, under special circumstances. *Grindall v. Godman*, 378

Where a defendant obtains an order to stay proceedings on payment of debt and costs, allowing the costs of entering and passing the record, is a matter entirely within the Master's discretion. *Keen v. Smith*, 286

MEMBER OF PARLIAMENT.

See SUGGESTION, 2.

MEMORANDUM.

See WITNESS, 4.

MERITS.

See ARREST, 1, 2.

MERITS (AFFIDAVIT OF).

See BAIL-BOND, 1.

1. An affidavit, swearing to merits, by the defendant, "as he is advised and believes," is sufficient. *Crosby v. Innes*, 566

2. An affidavit of merits, in support of an application to set aside a regular judgment, must appear to be made either by the defendant, his attorney or agent, or some person who has had such a connexion with the cause as acquaints him with its merits. *Rowbotham v. Dupree*, 557

MISNOMER.

MISNOMER.

Where the plaintiff in the declaration on a bill of exchange and promissory note was described as Henry H. Lindsay, the Court refused to set aside the declaration for irregularity, the defect being held to be cured by the 3 & 4 Will. 4, c. 42, s. 12. *Lindsay v. Wells*, 618

MORTGAGEE.

See INSOLVENT.

MORTGAGOR AND MORTGAGEE.

See COSTS, 6.

MUNICIPAL CORPORATION ACT.

The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 61, has effected no change in the mode of executing process from the superior courts in the city of Oxford; they are still to be executed by the sheriff of the county. *Grainger v. Taunton*, 190

NEW ASSIGNMENT.

See NOLLE PROSEQUI, 2.

Where a defendant pleads a special plea only, and the plaintiff new assigns, and the defendant pays money into Court upon the new assignment, the plaintiff is entitled to the costs of the writ, and the defendant to the costs of all the other proceedings prior to the new assignment. *Griffiths v. Jones*, 167

NEW TRIAL.

See WRIT (OF TRIAL), 3.

1. Where a cause has been tried twice by special juries, and a verdict for the plaintiff returned on both occasions, the Court will not open a consolidation rule for the trial of another similar action; it not being

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shewn that the case had not been fully brought before the jury. *Vaughan, J.*, dissentiente. *Foster v. Allenby*, 619

2. The 64th section of the first rule of H. T. 2 Will. 4, applies only to cases where a new trial is granted upon the whole record. *Bower v. Hill*, 183

NISI PRIUS.

See JURISDICTION, 2.

NOLLE PROSEQUI.

See COSTS, 24—DEMURRER, 4.

1. If a plaintiff enters a nol. pros. as to a part of the sum claimed in his declaration, the defendant is entitled to his costs under the 3 & 4 Will. 4, c. 42, s. 33; and the Court will not inquire, after judgment of nol. pros. signed, into the propriety of the pleas. *Williams v. Sharwood*, 371

2. Trespass. Pleas—first, not guilty; second, a justification. Replication and new assignment. Demurrer to replication and new assignment; 15*l.* damages on first issue, and nominal damages on second. The plaintiff entered a nol. pros. to the new assignment, and gave defendant judgment on demurrer; the Court set aside the nol. pros. *Strother v. Randerson*, 280

NON-ASSUMPSIT.

See PLEA, 14, 25.

NON PROS.

See DECLARATION (DEMAND OF)—JUDGMENT AS IN CASE OF A NON-SUIT, 8—REPLICATION—SUMMONS (WRIT OF), 2.

A non pros. for not entering the issue pursuant to rule, is irregular after notice of trial. *Howell v. Jacobs*, 394

NONSUIT.

See HABEAS CORPUS, 4.

In an action for use and occupation, it is not a ground for nonsuit that the plaintiff does not produce a written agreement under which the premises are held, if the evidence given by the plaintiff in support of his case does not disclose the existence of such an agreement. *Fry v. Chapman*, 265

NOTICE (SERVICE OF).

See CERTIORARI, 1—SMALL DEBTOR, 1.

NOTICE (OF TRIAL).

See NON PROS.

NULLITY.

See JUDGMENT AS IN CASE OF A NON-SUIT, 15—PLEA, 27.

NUNC PRO TUNC.

See APPEARANCE, 2—COGNOVIT.

OFFICER.

See PRIVILEGE.

OFFICER (MISTAKE OF).

See AMENDMENT, 2.

OFFICES (RULE AS TO), 645.

OUTLAWRY.

See DISTRINGAS, 7—SUMMONS (WRIT OF), 4.

1. In May, 1836, the defendant was outlawed, and, in February following, obtained judgment as in case of a nonsuit. In March, he obtained a writ of habeas to charge the plaintiff in execution for the costs of that judgment; and the present rule was moved on the 29th April:—*Held*, that the outlawry was a sufficient

ground for setting aside the writ, and that the application was not too late. *Aldridge v. Buller*, 733

2. Proceedings to outlawry cannot be taken on a writ of distringas originally issued to compel an appearance. *Vere v. Gomar*, 494

3. Where a defendant was beyond the seas at the time that the writ of *exigi facias* issued, the Court reversed the outlawry on payment of costs, and putting in bail in the alternative, according to the practice in the Common Pleas. *Levi v. Claggett*, 322

4. A motion to reverse an outlawry cannot be entertained, unless it expressly appear by the affidavits that the attorney making the application is duly authorized by the outlaw. *Houl-ditch v. Swinfen*, 36

OVERSEERS.

See EJECTMENT, 13.

OYER.

The Court will not permit an inspection of an administration bond, at the office of the registrar in Doctor's Commons, to be deemed good oyer, although a copy has been accepted by defendant's attorney, and the Ecclesiastical Court has refused to allow the bond to be produced at the office of the defendant's attorney. *The Archbishop of Canterbury v. Tubb*, 627

PARTICULARS.

See LIMITATIONS (STATUTE OF), 3—PLEA, 3—VARIANCE, 1, 4.

1. In an action by indorsee against acceptor of two bills of exchange for 500*l.* each, the declaration contained two counts on the bills only. The particulars of demand stated the action to be brought to recover 500*l.*, the amount of the bills set forth in the declaration. The plaintiff had arrested the defendant for 240*l.* only,

and the bills were given by the defendant to the drawer as a security for money paid by him for the defendant, and indorsed by the drawer to the plaintiff:—*Held*, that the defendant was entitled to farther and better particulars of the plaintiff's demand, *Alderson, B.*, dissentiente. *Daves v. Anstruther*, 738

2. In an action of covenant by the assignee of a lease, for non-payment of rent and non-repair, the Court will not compel the plaintiff to give particulars, with sums and dates. *Sowler v. Hitchcock*, 724

3. Where a plaintiff's attorney accidentally gives credit in his particulars for a sum of money, which the defendant sets up as a cross demand, the Court will allow the particulars to be amended on terms. *Preston v. Whiteheart*, 720

4. The fact of a plaintiff withholding the particulars of his demand, in disobedience of a Judge's order, is not a ground for discharging a defendant out of custody. *Graff v. Willis*, 715

5. If, to a declaration in the ordinary form, in indebitatus assumpsit, with particulars containing various causes of action, the defendant pleads payment into court, he is not precluded by his plea from contesting his liability in respect of any items beyond the amount paid into Court, as the particulars are not to be considered as part of the declaration. *Booth v. Howard*, 438

6. In order to obtain particulars in trespass, trover, or on the case, there must be an affidavit, stating that defendant does not know what the plaintiff is going for. *Snelling v. Chennells*, 80

7. The first count stated a special contract to indemnify the plaintiff against costs he might incur by paying a bill of exchange drawn by the defendant, and suing the acceptor thereof. Second count on the bill,

and money counts. The first particulars delivered were applicable to the second count only. A Judge then made an order for particulars under the first count, which particulars referred to the costs named by the plaintiff, and the amount of the bill. The jury having found a verdict for the plaintiff on the account stated, and for the defendant on all the other counts:—*Held*, that the second particulars were sufficient to enable the plaintiff to recover on the account stated, and that the defendant had not been misled by them. *Fisher v. Wainwright*, 102

8. The Court will not compel a plaintiff to give particulars in an action on a bill of exchange, the declaration containing only one count, unless under particular circumstances. *Brooks v. Farlar*, 361

9. In an action on the case, the Court will not require the plaintiff to deliver a particular of his claim, where, from the mode of alleging it in the declaration, there is no ambiguity as to the transaction in respect of which the action is brought. *Stannard v. Ullithorne*, 370

PARTY AND PARTY.

See Costs, 6—*SHERIFF*, 3.

PAUPER.

1. Where a plaintiff, suing in formâ pauperis, has given notice of trial, and petitioned for his discharge under the Insolvent Act, and a provisional assignee only has been appointed, the Court will not entertain a motion for security for costs, until he has been dispaupered. *Mylett v. Hucker*, 647

2. Where a pauper plaintiff gave notice of trial, and, on the second day of the assizes, withdrew his record, on the ground of its requiring amendment, the Court dispaupered him. *Facer v. French*, 554

PAYMENT.

See PLEA, 14.

PAYMENT (INTO COURT).

In an action for an attorney's bill, the defendant may, after a payment into Court, shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges. *Jones v. Reade*, 216

PAYMENT (PLEA OF).

See PLEA, 3, 15.

PENALTY.

See APPEARANCE, 1.

PEREMPTORY UNDERTAKING.

Where a plaintiff has made several defaults in fulfilling his undertaking to proceed to trial, the Court will make him pay the costs of the last application to enlarge his peremptory undertaking. *De Rutzen v. John*, 400

PLEA.

See DECLARATION, 5—NEW ASSIGNMENT—PARTICULARS, 5—PAYMENT INTO COURT—SHERIFF, 2.

1. A plea of never did promise is a nullity in an action of debt. *King v. Myers*, 686

2. In debt, payment cannot be given in evidence in mitigation of damages, but must be pleaded. *Belbin v. Bott*, 604

3. In debt, where there is no plea of payment, the admission in the particulars of a sum paid cannot be used in answer to the plaintiff's action. *Ernest v. Brown*, 637

4. To a declaration in debt, the defendant pleaded, first, as to part, a set-off; secondly, as to further part, goods returned; thirdly, as to the residue, payment into Court. Upon

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these pleas, he proved sufficient to cover the plaintiff's demand stated in his particulars, but less by 2*l.* than he alleged in his plea of set-off:—*Held*, that the plaintiff was entitled to a verdict for the 2*l.* *Green v. Marsh*, 669

5. In debt on bond, a defendant cannot plead as to part the receipt of certain bills of exchange, and, as to the residue, payment of certain monies in satisfaction. *Worthington v. Wigley*, 504

6. In an action by indorsee against indorser of a bill of exchange, a plea that defendant did not draw the bill is not a nullity, so as to entitle plaintiff to sign judgment. *Allen v. Walker*, 460

7. To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the bill became due he tendered plaintiff the amount of the bill, with interest:—*Held* bad upon demurrer. *Poole v. Crompton*, 468

8. *Semble*, if the acceptor of a bill goes to the holder's residence when the bill becomes due, and cannot find him, but afterwards tenders him the money, such a plea of tender would be good. Per Lord Abinger, C. B. *Ib.*

9. To an action for work done as an attorney and solicitor, defendant pleaded that he had derived no benefit from the work, and also that plaintiff advised defendant to strike a docket against one J. H., and promised to indemnify him from the expenses occasioned thereby:—*Held* bad, as amounting to the general issue. *Hill v. Allen*, 471

10. In an action against a carrier for the loss of a parcel of more than 10*l.* value, if the defendant wishes to avail himself of the want of notice of value, under the 11 Geo. 4 & 1 Will. 4, c. 68, he must plead it specially. *Syms v. Chaplin*, 429

11. In an action for libel, it is not

necessary to plead specially that the alleged libel was a privileged communication between attorney and client; but that defence is available under the plea of *not guilty*. *Lillie v. Price*, 432

12. In assumpsit for money paid to the use of the defendants, they pleaded specially circumstances shewing that the policy of insurance in respect of which the payments were made had been so framed as to be utterly unavailing. Upon special demurrer, on the ground, amongst others, that the plea was argumentative and amounted to the general issue—The Court inclined to think the plea good, but allowed the plaintiff to withdraw his demurrer and reply *de novo*, without costs. *Cole v. Le Souef*, 41

13. An informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try; the objection can only be taken advantage of on special demurrer. *Smith v. Smith*, 84

14. Quære, if payment, *after action brought*, can be given in evidence in mitigation of damages, under non assumpsit. *Richardson v. Robertson*, 82

15. Payment should be pleaded in confession and avoidance, and must conclude with a verification. *Goodchild v. Pledge*, 89

16. In assumpsit for work and labour, a defence that the work was to be done without reward, may be given in evidence under the general issue. *Jones v. Nanny*, 90

17. *Semble*,—In all cases in assumpsit, or debt on simple contract, where the defence shews a liability different from the implied promise or liability alleged in the declaration, the general issue is the proper plea. *Ib.*

18. The Court will not set aside a plea because it commences with a formal defence. *Bacon v. Ashton*, 94.

19. Since the new rules, a set-off must be specially pleaded. *Graham v. Partridge*, 108

20. In an action against the sheriff for a false return, the declaration alleged that the *sheriff seized and took in execution and levied* certain goods. Plea that he did not seize and take in execution *and* levy:—*Held*, on special demurrer, that the traverse should have been in the disjunctive. *Stubbs v. Lainson*, 162

21. In debt for goods sold defendant pleaded, as to parcel, that the sum was the residue of a larger sum agreed to be paid for a boat warranted by the plaintiff: that the boat was unsound, and only worth a certain sum, which had been paid to plaintiff at the time of the sale:—*Held*, that the plea amounted to the general issue. *Dicken v. Neale*, 176

22. It is competent for a defendant, under the plea of *nunquam indebtedatus*, to prove a contract, by which he is liable only to a portion of the plaintiff's demand. *Jones v. Reade*, 216

23. The declaration consisted of a count against defendant, as acceptor of a bill of exchange, and another count on an account stated: defendant pleaded, that he did not accept the bill in the declaration mentioned.—*Held*, that as the plea was not, in terms, confined to the first count, it must be taken to be pleaded to the whole declaration, and, therefore, bad on special demurrer. The 9th rule of H. T. 4 Will. 4, means, that pleas, without the formal parts, must be taken to be pleaded in bar, in contradistinction of further maintenance. *Putney v. Swan*, 296

24. To an action for negligence in driving an omnibus, defendant pleaded that plaintiff's carriage was under the government of one of his sons, and that if the said son had driven in a moderate and skilful manner, the collision would not have happened; but

that he drove so unskilfully, and with such velocity, that the carriage of the plaintiff struck against the stage-coach of the defendant; concluding with a special traverse that the collision was caused by the carelessness of defendant's servant:—*Held* bad, as amounting to the general issue.

Gough v. Bryan, 765

25. In an action by an executor on a promissory note, the declaration alleged a promise to the plaintiff after the death of his testator:—*Held*, that non assumpsit was a good plea. *Gilbert v. Platt*, 748

26. Assumpsit by indorsee against maker of a promissory note. Plea, that the note was made for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration. Replication, that plaintiff had no notice of the illegality of the consideration, and that he gave value:—*Held*, that, upon those pleadings, it was incumbent on the defendant to give some evidence of the illegal concoction of the note, before the plaintiff could be called upon to prove he gave value. *Edmunds v. Groves*, 775

27. If a defendant, who is an attorney, really appears in person, but, in point of form, as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served. *Kerrison v. Wallingborough*, 564

28. A plea of plene administravit does not require counsel's signature. *Read v. Speer*, 330

PLEA (DEMAND OF).

See JUDGMENT FOR WANT OF A PLEA, 1.

PLEA (FRIVOLOUS).

See SUPERSEDEAS, 2.

Where, to an action on a bill of exchange, the defendant pleaded that he

PLEAS (SEVERAL).

was not an attorney of the court in which the action was brought; the Court refused to set the plea aside, though it was sworn the defendant had admitted it was pleaded for delay.

Lewis v. Ker, 327

PLEAD (NOTICE TO).

In actions in which imparlance is abolished, the defendant is still entitled to notice to plead before judgment can be signed for want of a plea.

Fenton v. Anstice, 113

PLEAD (RULE TO).

See DECLARATION (NOTICE OF).

An appearance was entered for the defendant, and, after notice of declaration and demand of plea, he took out a summons for time to plead, which was not returnable until after the time for pleading expired. The plaintiff signed judgment:—*Held*, that a rule to plead was necessary, though an appearance had been entered for the defendant, but that the objection was waived by the summons for time. *Bolton v. Manning*, 769

PLEAD (TIME TO).

Defendant, by a Judge's order, obtained "four days' time to plead," omitting the word "further:—"*Held*, that the time given by the Judge's order was to be computed from the date of the order, and not from the expiration of the original time to plead. *Lane v. Parsons*, 359

PLEAS (SEVERAL).

1. Where, to an action on a check, the defendant pleaded but one plea, which admitted the making the check, the Court refused to permit him also to plead that the check required a stamp. *Jenkins v. Creech*, 293

2. Where a plaintiff has consented to a rule to plead several matters, the

PLEAS (SEVERAL).

Court will not entertain an application to set aside any of these pleas. *Howen v. Carr*, 305

8. In case for injury to the plaintiff's reversionary interest, the defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be the tenant in the declaration was not tenant. The defendants were a company incorporated by act of Parliament, which enabled them to plead the general issue, and give in evidence that the act complained of was done in pursuance of the authority of that act. The Court refused to allow the other pleas, together with the general issue. *Fisher v. The Thames Junction Railway Company*, 778

PLEADING.

See VENUE, 3.

The plaintiff being in the custody of the Marshal of the King's Bench, was charged in execution on an attachment which the defendant had caused to be issued out of the Exchequer:—*Held*, by *Parke, Bolland, Alderson*, Bs., (Lord *Abinger*, C. B., dissentiente), that there was *prima facie* an act of trespass, for which an action was maintainable, and that if the defendant were justified under the writ, he should plead that matter specially. *Briant v. Clutton*, 66

PLEADING (ISSUABLY).

See DEMURRER, 7.

PLEADING (TIME FOR).

See STAY OF PROCEEDINGS, 1.

1. An attorney resident in London has only four days' time for pleading in a country cause, notwithstanding the Uniformity of Process Act, (2 Will. 4, c. 39). *Lowder v. Lander*, 684

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2. *Semble*, that the Uniformity of Process Act does not affect the time within which attornies shall be bound to plead. *Brenton v. Lawrence*, 506

POOR RATES.

See CROWN LAND.

POSTEA.

See COSTS, 4, 18.

In an action against a carrier for negligence, the declaration stated the contract to be, to carry goods from Birmingham to Bristol, and to deliver them to the plaintiff at Bristol. The defendant pleaded the general issue, and that, though the goods were delivered to the defendant to be carried from Birmingham to Bristol, yet they were not delivered to the defendant to be delivered to the plaintiff at Bristol. The jury found for the plaintiff on the general issue, with damages, and for the defendant on the other plea. *Semble*, on this finding the defendant is entitled to the *postea*. *Smith v. Brown*, 736

PRINCIPAL AND AGENT.

See AFFIDAVIT (OF DEBT), 3—DISTINGUISHING, 3, 4—TENDER.

Where the debt has been paid to the plaintiff's clerk after writ issued, but before service thereof, and the attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of his writ. *Wyllie v. Phillips*, 644

PRISONER.

See AFFIDAVIT (OF DEBT), 5—BAIL, 12, 18, 20—JUDGMENT, 1—PARTICULARS, 4, SHERIFF, 11—SUPERSEDEAS, 1, 3, 4.

1. If a defendant, desirous of being removed by a habeas corpus from the Fleet to the King's Bench Prison,

pays a fee properly due from the plaintiff to the Warden, on commitment to the custody of the latter, he cannot afterwards compel the plaintiff to reimburse him. *Burt v. Bryant*, 726

2. 1 Reg. Gen. H. T. 2 Will. 4, s. 72, as to the presence of attornies at the execution of cognovits by prisoners, does not apply to defendants in custody on *final* process, and the fact of a summons having issued on the judgment is immaterial. *France v. Clarkson*, 699

3. It is a sufficient compliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72, if the attorney attending for the defendant declares *verbally* that he subscribes as the defendant's attorney. *Wallace v. Brockley*, 695

4. If a defendant, without fraud, represents a person not an attorney to be one acting on his behalf, he is still entitled to the benefit of the rule. *Ib.*

PRIVILEGE.

An officer of the Exchequer being sued in Chancery as executor with others, served the plaintiff with a writ of privilege; and on application to set aside the writ, the Court refused, on the ground that the writ did not operate as an injunction, or supersede the necessity of pleading the privilege. *In re Robert Thompson*, 745

PROCEDENDO.

See INFERIOR JURISDICTION.

PROCESS (ABUSE OF).

See ARREST, 1, 2.

PROCESS (EXECUTION OF).

See EXECUTION, 1—MUNICIPAL CORPORATION ACT.

PROCESS (SERVICE OF).

See SUMMONS (WRIT OF), 6.

The Court will dispense with strict

personal service, where it appears the process has come to the possession of the defendant. *Williams v. Piggott*, 320

PROHIBITION.

1. A prohibition does not lie *after* sentence, unless it appears by the sentence that the Ecclesiastical Court has pronounced on matters conusable at common law, although there are several articles contained in the libel, some of which are so conusable. *Hart v. Marsh*, 424

2. The Court will not grant a prohibition to an Ecclesiastical Court after sentence pronounced, where it does not appear, either by direct evidence or presumption of law, that any steps are taken or contemplated to enforce it, although a significavit issuing upon it may have been quashed. *Bodenham v. Ricketts*, 120

3. If a Consistory Court proceeds to hear exceptions to an inventory, exhibited by an executor, a prohibition lies. *Griffiths v. Anthony*, 223

PROMISSORY NOTE.

See AFFIDAVIT (OF DEBT), 4—BREACH—DECLARATION, 4—MISSNOMER—PLEA, 25, 26—VARIANCE, 5.

PUIS DARREIN CONTINUANCE.

See EXECUTOR, 2.

When a rule nisi has been obtained for leave to plead coverture puis darrein continuance, the ground of the plea having arisen more than eight days before the time of pleading, the Court will not, without consent, introduce into the rule the term that the affidavit of verification required by 2 Reg. Gen. H. T. 4 Will. 4, shall be dispensed with. *Powell v. Duncan*, 550

QUARTER SESSIONS.

QUARTER SESSIONS.

See CERTIORARI, 7.

QUO MINUS.

The statement of quo minus in a declaration is merely surplusage, and not a ground of special demurrer; the proper course is to apply to a judge at chambers to strike it out. *Alderson v. Johnson*, 294

RECORD.

See WRIT.

RECORD (RE-SEALING).

Where notice of trial is countermanded, it is not necessary to re-seal the record, unless the return day has passed. *Chandler v. Beswald*, 311

RELATION.

See SUPERSEDEAS, 3.

RELEASES.

See ARBITRATION, 2.

RENDER.

See ATTACHMENT, 5—STAY OF PROCEEDINGS, 2.

1. After notice of render, it is irregular to serve a writ on the bail, although it may have been sued out previous to the notice of render given to the plaintiff. *Lewis v. Grimstone*, 711

2. Where a cause has been removed from the Palace Court, the defendant's bail cannot tender him to the county gaol, pursuant to the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, the Palace Court not being a superior court of record, within the meaning of that act; and the plaintiff does not waive the objection by declaring against the defendant as in the custody of the Marshal of the King's Bench. *Seaitb v. Brown*, 412

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REPLEADER.

See COSTS, 26—PLEA, 13.

1. A judgment non obstante veredicto proceeds on the confession in the plea, and the insufficiency of the avoidance; therefore, where a plea raises an immaterial issue, but contains no confession of the cause of action, the proper course is to award a repleader, and not to give judgment non obstante veredicto. *Plummer v. Lee*, 755

2. A repleader cannot be granted as to part of a cause of action. *Ib.*

REPLEVIN.

See ABATEMENT (OF WRIT).

REPLICATION.

To a declaration for goods sold and delivered, the defendant pleaded, first, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.*, part of the last-mentioned sum, payment before action brought; as to 18*l.*, further parcel of the said sum, payment into Court of that amount; as to the residue, a set-off. The plaintiff replied, accepting the 18*l.* in satisfaction, &c., taking no notice of the other pleas. The Court gave leave to the defendant to sign a judgment of non pros., unless the plaintiff amended his replication on payment of costs, or consented to taxation of costs as upon a nol. pros. in respect of the unanswered pleas. *Topham v. Kidmore*, 676

REQUEST.

See AFFIDAVIT (OF DEBT), 9.

RE-SEALING RECORD.

See RECORD (RE-SEALING).

REVOCATION (OF AUTHORITY.)

See ARBITRATION, 12, 13.

RIGHT (OF WAY.)

In trespass, the defendant justified the trespasses complained of under a right of way over the closes in which &c., claiming the way as having been used for forty years by the occupiers of his farm as of right and without interruption. The plaintiff replied, traversing that the occupiers of the defendant's farm had for and during the full term of forty years and upwards, as of right, had and used the way without interruption:—*Held*, that, under this replication, the plaintiff was at liberty to shew the character and description of the user of the way during any part of the time; as, that it was used by stealth; or in the absence of the occupier of the close and without his knowledge, or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right: the words of the fifth section of the 2 & 3 Will. 4, c. 71, "not inconsistent with the simple fact of enjoyment," being referable to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised "as of right." *Beasley v. Clarke*, 50

RIGHT (PETITION OF).

1. A petition of right was addressed to the King "in his Court of Exchequer;" the King indorsed it "soit droit fait:"—*Held*, that the Exchequer had no jurisdiction to adjudicate upon it. *Ex parte Pering*, 750

2. Where a petition of right is indorsed generally, it goes to the Court of Chancery; and in order to give the other courts jurisdiction, there must be a special indorsement, commanding right to be done in the particular Court. *Ib.*

ROLL (SATISFACTION ON).

The Court will not order the pro-

RULE (SERVICE OF).

thonotary to enter satisfaction on the roll in a case where four only of five plaintiffs have given their consent, although the fifth plaintiff is resident in America and cannot be found, and his attorney consents. *Davis v. Jones*, 503

RULE (ENLARGEMENT OF).

See STAY OF PROCEEDINGS, 3.

RULE (FORM OF).

See ARBITRATION, 6.

RULE (SERVICE OF).

See ARBITRATION, 7—ATTACHMENT, 1, 3, 7.

1. The Court will, under special circumstances, allow a rule, calling on an attorney to pay costs, to be served on his agent. *Burrell v. Seaton*, 661

2. It is a sufficient service of a rule to compute, if it is left at the chambers of the defendant, and a person resident there states his having transmitted it to him. *Carew v. Winslow*, 543

3. A rule to compute cannot be made absolute on an affidavit that the rule nisi has been left at the lodgings of the defendant, where he was served with the writ, if it appears that the defendant had left before the rule nisi was obtained: it must be shewn that endeavours have been made to find the defendant, without success; then the Court will grant a rule nisi that service of the rule, by leaving it at the defendant's last place of abode, and sticking up a copy in the office, may be deemed good service. *Black v. Cloup*, 270

4. Service of a rule to compute at the residence of the defendant, where the process was served on a female servant of the defendant, is sufficient. *Thomas v. Lord Ranelagh*, 258

5. Service of a rule to compute "on a workman on the defendant's

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premises," is insufficient. *Hitchcock v. Smith*, 248

6. Service of a rule to compute "on the landlady of the house at which the defendant lodges," is insufficient. *Salisbury v. Sweetheart*, 243

7. Service of a rule nisi to compute, by leaving it at defendant's apartments, in which no person then was, though the defendant then resided there, is not sufficient. *Chaffers v. Glover*, 81

RULES (OF PRISON).

See SMALL DEBTOR, 3, 8.

SATISFACTION (ON RECORD).

The Court refused to order satisfaction to be entered upon the record in an action for breach of promise of marriage, without a warrant of attorney from the plaintiff, notwithstanding a judge's order had been obtained for the purpose. *Wood v. Hurd*, 188

SCIRE FACIAS.

1. Proceedings in sci. fa. on a judgment are within 1 Reg. Gen. H. T. 4 Will. 4 (Pleading Rules), and consequently must be intitled of a day certain, instead of a term. *Collins v. Beaumont*, 700

2. The Court will permit judgment to be signed on a sci. fa. after eight days from the return, where the defendant resides abroad, he having had reasonable notice of the proceeding. *Weatherhead v. Landles*, 189

3. A writ of sci. fa. cannot be tested in vacation, notwithstanding the provisions of sect. 12 of the Uniformity of Process Act. *Seaton v. Heap*, 247

SCIRE FIERI.

See EXECUTOR, 1—SHERIFF, 8.

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SET-OFF.

See PLEA, 19.

It is no objection to the use of particulars of set-off that they are headed in a different Court from that in which the action is brought, if they have not been delivered pursuant to a Judge's order. *Lewis v. Hilton*, 267

SET-OFF (OF COSTS).

See ATTORNEY (LIEN OF)—Costs, 5.

SHERIFF.

RULES UPON, OTHER THAN OF LONDON AND MIDDLESEX, TO RETURN WRITS, 212—TO SET ASIDE ATTACHMENT AGAINST, 446.

See ATTACHMENT, 5—BAIL, 17—CAPIAS, 2—INTERPLEADER, 1, 2, 4, 5, 6, 7, 9—MANDATE—MUNICIPAL CORPORATION ACT—PLEA, 20—STAY OF PROCEEDINGS, 3.

1. Where the sheriff, after levy, received notice that the defendant had petitioned for his discharge under the Insolvent Debtors' Act, and being subsequently ordered to return the writ, returned that he had levied to a certain amount:—*Held*, that he was concluded by this return, and that the defendant's discharge was no answer to a rule calling on him to pay over to the plaintiff the amount levied, he having neglected to use due diligence in inquiring as to the defendant's discharge. *Field v. Smith*, 735

2. A declaration on the 28 Eliz. c. 4, stated that the sheriff took "more and other consideration than is by the statute limited and appointed in that behalf; that is to say, divers large sums of money, in the whole amounting to the sum of 1*l.* 16*s.* 2*d.*, more than is in the said act limited and appointed in that behalf:—*Held* bad on special demurrer. *Ashby v. Harries*, 742

3. Where a writ of ca. sa. has been sued out, and the parties subsequently compromise, the Court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. *Hedges v. Jordan*, 6

4. Where a sheriff has applied to the Court under the Interpleader Act, and his rule is discharged, he is entitled to a reasonable time for the return of the writ after the disposal of the rule, before an attachment can issue against him. *Rex v. Sheriff of Hertfordshire*, 144

Where a sheriff does not sell goods seized by him under a test. fi. fa. before he leaves office, and the new sheriff distrains him that he sell the goods seized, on a motion afterwards to increase issues, the Court will allow him to be distrained for the amount of the debt directed to be levied, and a further sum to cover the plaintiff's costs consequent on the delay, as well as those of the application. The rule for this purpose is absolute in the first instance. *Nowell v. Underwood*, 229

6. A plaintiff has not lost a trial in a town cause, if he could have proceeded to trial at any time in the term next after the return of the writ; and, therefore, where a plaintiff might have proceeded to trial at the third sitting, though he could not at the first, he is not entitled to have the attachment stand as a security. *Rex v. Sheriff of Shropshire*, 256

7. A sheriff is bound to arrest a party within a reasonable time after the delivery of the writ to him; and if he neglect so to do, he is liable for any damage which may result from his negligence: and, in order to maintain the action, it is not necessary to aver in the declaration that the writ has been returned. *Brown v. Jarvis*, 281

8. In an action against executors,

SHERIFF (RETURN OF).

the plaintiff having obtained a verdict, sued out a fi. fa. against the goods of the testator, to which the sheriff returned nulla bona. A scire fieri inquiry then issued, to which the sheriff also returned nulla bona. This return was set aside, on the ground that there was evidence of a devastavit, and a new scire fieri inquiry issued. The defendants then paid to the sheriff the debt and costs in the original action, and he returned that he had levied them out of the goods of the testator:—*Held*, that the sheriff should be made a party to a rule, to compel payment to the plaintiff of the costs of the two inquiries. *Palmer v. Waller*, 315

9. The Court refused to compel a sheriff to refund to a defendant monies arising from an execution on his goods, on the ground that the action was defended by an attorney without authority, until it appeared whether such attorney was insolvent or not. *Stanhope v. Eavery*, 357

10. When the defendant has put in bail, the plaintiff must except to such bail before he can attach the sheriff for not bringing in the body, although the defendant has given notice of justification. *Rex v. The Sheriff of London*, 387

11. Where a person is in custody of the sheriff on a criminal charge, it is not necessary to obtain an order of the Court for the sheriff to detain him in a civil suit. *Grainger v. Moore*, 456

SHERIFF (DISTRAINING ON).

See SHERIFF, 5.

SHERIFF (NOTES OF).

See WRIT (OF TRIAL), 2.

SHERIFF (RETURN OF).

See SHERIFF, 1.

A return to a writ of capias, that

SHERIFF (RETURN OF).

the defendant is not to be found, is bad. *Rex v. Sheriff of Kent*, 451

SHEWING CAUSE.

See AFFIDAVIT, 6.

SHORT NOTICE (OF TRIAL).

See COUNTERMAND OF NOTICE OF TRIAL.

SIMILITER.

See JUDGMENT AS IN CASE OF A NON-SUIT, 15.

SIGNIFICAVIT.

See PROHIBITION, 2.

SLANDER.

SLANDER (OF TITLE).

1. In all actions of slander it is necessary to set out the words in the declaration, whether they be actionable in themselves, or only so by reason of special damage. *Gutsole v. Mathers*, 69

2. The declaration alleged that the plaintiff being about to sell some tulips, the defendant *falsely represented that the said tulips were stolen property*, and also that the said tulips were the property of defendant's brother, and that whoever bought the said tulips would buy stolen property, by reason whereof the plaintiff was unable to sell the said tulips:—*Held*, on motion in arrest of judgment, that the words should have been set out, *Ib.*

SMALL DEBTOR.

1. The notice of an application, under the 48 Geo. 3, c. 123, ought to be served on the plaintiff, and not his attorney; but if it is not, the defendant may, on the notice being disposed of, take a rule nisi, for his dis-

SMALL DEBTOR. 821

charge, to be served on the plaintiff. *Johnson v. Rutledge*, 579

2. A defendant in execution in ejectment for 1s. damages, and costs exceeding 20l., is, nevertheless, entitled to his discharge under the 48 Geo. 3, c. 123, s. 1, after having been in custody for twelve months. *Doe d. Daffey v. Sinclair*, 615

3. A defendant, who has not been confined within the walls of the prison, but has had the benefit of the rules, is not entitled to his discharge under the 48 Geo. 3, c. 123, though "in execution" twelve successive calendar months. *Barnard v. Symonds*, 520

4. The 48 Geo. 3, c. 123, applies to the case of a prisoner in execution for damages not exceeding 20l., recovered against him in an action for crim. con. *Goodfellow v. Rollings*, 198

5. A prisoner in execution more than twelve months, for a sum under 20l., the damages in ejectment, is entitled to be discharged under the 48 Geo. 3, c. 123, s. 1. *Doe d. Threlford v. Ward*, 290

6. A prisoner is entitled to his discharge under the 48 Geo. 3, c. 123, although he refuses to deliver his schedule pursuant to the compulsory clauses of the Lords' Act, after the expiration of his sixty days claimed by him, and which have expired before the end of the twelve months' imprisonment, in respect of which he claims his discharge. *Davis v. Curtis*, 344

7. The notice under the 48 Geo. 3, c. 123, s. 1, must be served on the plaintiff himself personally, and the latter does not waive the objection that it has not been so served, by appearing on the notice. *Biddulph v. Gray*, 406

8. A prisoner *within the rules* is not entitled to his discharge under the 48 Geo. 3, c. 123. *Gilbert v. Pope*, 449

822 SPEAKER'S CERTIFICATE.

SPEAKER'S CERTIFICATE.

See COSTS, 10—SUGGESTION, 1, 2.

SPECIAL JURY.

See JURY.

STAMP.

See LANDLORD AND TENANT, 2—PLEAS (SEVERAL).

STAY OF PROCEEDINGS.

See COSTS (SECURITY FOR), 3.—SUMMONS (OF JUDGE), 1, 2.

1. A summons to plead several matters returnable in vacation, at the hour the judgment office opens, on the day after the time for pleading expires, is a stay of proceedings, although the time for pleading has been enlarged. *Spenceley v. Shouls*, 562

2. The render of the principal, and notice thereof by bail, does not operate as a stay of proceedings, under R. T. T. 3 Will. 4, unless the costs of writ and service thereof are paid. *Horn v. Whitcomb*, 328

3. The Court will not, on an application to set aside a warrant of attorney, and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside. *Cassell v. Lord Glengall*. 269

4. The enlargement of one rule is a violation of a subsequent one in the same matter, which is drawn up with a stay of proceedings. *Wyatt v. Prebble*, 268

SUBPŒNA.

See ATTACHMENT, 10—WITNESS, 2.

The affidavit, on which to obtain an attachment for not obeying a subpœna, must state that the original subpœna was shewn at the time of serving the copy. *Garden v. Creswell*, 461

SUMMONS (WRIT OF).

SUGGESTION.

See COURT OF REQUESTS, 1, 2, 3.

The Court permitted a suggestion to be entered to deprive the plaintiff of costs after final judgment and writ of execution issued, where it appeared that the defendant could not apply sooner, and a Judge at chambers had refused to stay proceedings after verdict. *King v. Erle* 595

2. The Court refused to enter on the roll a suggestion of the grounds of their judgment, on a motion, under the 9 Geo. 4, c. 23, to enter up judgment on the certificate of the speaker of the house of commons, for costs incurred by the plaintiffs in the prosecution of a petition against the return of members. *Ranson v. Dundas*, 207

SUMMARY JURISDICTION.

See ATTORNEY, 2, 6—ATTORNEY (NEGLIGENCE OF)—EXECUTION, 1.

SUMMONS (OF JUDGE).

See STAY OF PROCEEDINGS, 1.

1. A summons for time to plead, returnable at ten o'clock in the morning in term time, at chambers, operates as a stay of the plaintiff's proceedings, although it is well known that a judge does not attend at chambers at that hour. *Byles v. Walter*, 232

2. *Semble*, that a summons for further time to plead, returnable at half past ten in the morning during term, is a stay of proceedings. *Bebb v. Wales*, 458

SUMMONS (WRIT OF).

See DISTINGAS, 1—WRIT (OF TRIAL), 7.

1. When a writ was endorsed, pursuant to 2 Reg. Gen. H. T. 2 Will. 4, with a certain amount of debt and costs, and that amount, together with

5s. more, was paid within the four days prescribed by the rule, and more than one-sixth of the costs, including the 5s., was disallowed on taxation:—*Held*, not within the rule, and therefore the defendant was not entitled to the costs of taxation under it. *Ward v. Gregg*, 729

2. A plaintiff has four terms from the service of a writ of summons, within which to enter an appearance for the defendant, if the latter does not appear. *Liddel v. Cranch*, 662

3. A copy of a writ of summons was indorsed, "This writ was issued by W. L., No. 32, Great James-street, Bedford-row, agent for the plaintiff in person, who resides at Dartmouth:"—*Held*, insufficient. *Lloyd v. Jones*, 161

4. It is not essential to the validity of an alias or pluries that a writ of summons or capias should be previously returned, except where the object is to save the statute of limitations, or where the capias is made the foundation of proceedings to outlawry. *Gregory v. Des Anges*, 193

5. A mistake in the year in the teste of the copy of a writ of summons, the writ itself being right, is a mere irregularity, which is waived if the defendant does not come to the Court before the time for entering an appearance has elapsed. *Edwards v. Collins*, 227

6. Where a writ of summons issued against *Thomas Gray*, and was served on *William Gray*, the Court refused to set aside the proceedings. *Griffin v. Gray*, 331

SUNDAY.

See ATTORNEY (ADMISSION OF), 2.

SUPERSEDEAS.

See ERROR, 4.

1. The marshal or warden is not bound, under 1 Reg. Gen. H. T. 2
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Will. 4, s. 88, to discharge a prisoner who is supersedable, without an order of the Court or a Judge. *Robinson v. Creswell*, 601

2. Where a defendant has been superseded through the neglect of the plaintiff, the Court will not allow him the costs of an action on the judgment, although the defendant has caused expense and delay by pleading a false plea. *Hall v. Pierce*, 603

3. As against prisoners, 3 Reg. Gen. H. T. 4 Will. 4, abolishes the doctrine of relation, so as to prevent them from reckoning the term previous to a vacation, in which final judgment is signed, as one of those within which a plaintiff must charge in execution, so as to prevent the defendant from becoming supersedable. *Colbron v. Hall*, 534

4. If a prisoner is supersedable in consequence of the plaintiff not charging him in execution in due time, pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 85, the lapse of time is no answer to an application for his discharge. *Colbron v. Hall*, 534

SURPLUSAGE.

See EJECTMENT, 8—QUO MINUS.

TAXATION.

See ATTORNEY, 4—ATTORNEY (BILL OF), 1, 2—ATTORNEY AND CLIENT—COSTS, 15—EJECTMENT, 4—INQUIRY (WRIT OF)—SUMMONS (WRIT OF), 1.

1. The Court has no power to refer an attorney's bill for taxation independently of the 2 Geo. 2, c. 23; and as the 12 Geo. 2, c. 13, takes agents' bills out of the former statute, they cannot be referred for taxation, although a suit is pending for their amount. *Weymouth v. Knipe*, 495

2. A judge has no power to refer an attorney's bill for taxation, upon the undertaking of one of two persons

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jointly liable; but if there are sufficient grounds, a special application should be made to the Court for that purpose. *Hoby v. Pritchard*, 301

3. Although a defendant may have appeared in an action, and the plaintiff taxes his costs, without giving notice of taxation, that is not an irregularity sufficient to induce the Court to set aside a judgment and subsequent proceedings. *Lloyd v. Kent*, 125

4. The rule which requires notice of taxation of costs does not apply unless the defendant has appeared. *Bolton v. Manning*, 769

TENDER.

See PLEA, 8.

Where a person demands the payment of money at his office, such demand amounts to a special authority for his clerk there to receive it; therefore, in his absence, a tender to the clerk is a good tender, although he states that he is not authorized to receive the money. *Kinton v. Braithwaite*, 101

TERM.

See SCIRE FACIAS, 1.

TESTE (OF WRIT).

See SUMMONS (WRIT OF), 5.

TIME (CALCULATION OF).

See ATTORNEY (ADMISSION OF), 2—BAIL, 6—JUDGMENT FOR WANT OF A PLEA, 1, 2—PLEAD (TIME TO).

The 8th rule of H. T. 2 Will. 4, as to the calculation of time, applies to pleas in abatement. *Ryland v. Wormwald*, 581

TORT.

See WRIT (OF TRIAL), 1.

TREBLE COSTS.

See COSTS, 1, 13, 21.

TRESPASS.

See COSTS, 1, 4, 7, 9—NOLLE PROSEQUI, 2—PARTICULARS, 6—PLEADING—RIGHT OF WAY—VERDICT.

Where a party has sustained an injury, which forms the subject of an action of trespass, and there is also a consequential damage, he may sue in case, or trespass, at his election. *Wells v. Ody*, 95

TRIAL (COSTS OF).

See COSTS, 15, 23.

TRIAL (LOSS OF).

See BAIL-BOND, 3—SHERIFF, 6.

TRIAL (NOTICE OF).

1. A notice of trial in due time, according to the practice of the Court, is regular, although a previous notice has been given which is void, and has not been countermanded. *Fell v. Tyne*, 146

2. Where a cause was tried in the absence of defendant's attorney before the time specified in the notice of trial, the Court set aside the verdict without an affidavit of merits. *Hanslow v. Wilks*, 195

TROVER

See PARTICULARS, 6.

To trover for trees: defendant pleaded that he was seised in fee of a close, and that he cut the trees growing thereon, and delivered them to R. R. to be kept for him; that R. R. delivered them to plaintiff, whereupon defendant took them from plaintiff, which was the conversion complained of:—*Held* good on special demurrer. *Morant v. Sign*, 319

UNIFORMITY OF PROCESS ACT.

See ATTORNEY (PRIVILEGE OF)—PLEADING (TIME FOR), 1, 2—SCIRE FACIAS, 3.

VARIANCE.

UNDERTAKING.

See ATTORNEY, 6.

VACATION.

See ATTACHMENT, 5—BAIL, 15—SCIRE FACIAS, 3—STAY OF PROCEEDINGS, 1.

VARIANCE.

See ARBITRATION, 19—JUDGMENT (ARREST OF), 1—OUTLAWRY, 2—PARTICULARS, 7.

1. Particulars of demand stated the action to be brought to recover the deposit paid upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out for better particulars, which was dismissed, upon the plaintiff's attorney stating that the objections were matters of law only. Subsequently, a notice was delivered to the defendant's attorney, that the objections were set forth in the plaintiff's answer to defendant's bill in Chancery. At the trial it appeared that the only objection was matter of fact. The Court refused a new trial, the defendant's attorney declining to make affidavit that he had been misled. *Correll v. Cattle*, 598

2. The value of materials cannot be recovered under a count for work and labour only. *Heath v. Freeland*, 166

3. The omission to transcribe into the issue delivered the dates of the pleadings, constitutes a variance of which the defendant is entitled to avail himself after trial, and the roll is made up, although the dates appear on the roll. *Worthington v. Wigley*, 209

4. The plaintiff's particulars were for goods sold on the 6th of January; the evidence given at the trial was of goods sold on the 28th of May. A verdict having been found for the plaintiff, the Court refused to set it aside, all other accounts between the

VENUE.

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parties having been settled. *Flemming v. Crisp*, 454

5. Plaintiff declared on a note dated the 10th of November, but in the notice to admit the handwriting, described the note as bearing date the 10th of October. A verdict having been found for the plaintiff, the Court refused to set it aside, as it did not appear the defendant had been misled. *Field v. Flemming*, 450

VENIRE DE NOVO.

Where several breaches are assigned, some of which are bad, and the jury give general damages, the Court will not arrest the judgment, but will award a venire de novo. *Leach v. Thomas*, 612

VENUE.

1. When the venue has been retained on an undertaking to give material evidence in the county, and the plaintiff omits to do so, the objection must be taken at the trial. *How v. Pickard*, 606

2. A plaintiff laying his venue out of London or Middlesex, for the purpose of obtaining speedy execution, if he succeeds, is entitled to his costs of trying in the place of trial, unless the venue has been so laid, for the purpose of oppression. *Vere v. Moore*, 367

3. It is regular to serve a rule to change the venue and deliver a plea at the same time, notwithstanding the new rules of pleading, although the issue which must be joined between the parties will prevent the plaintiff from giving an undertaking to give material evidence in the original county, or from fulfilling it. *Phillips v. Chapman*, 250

4. In an information of intrusion the Crown may of right change the venue, or have the inquisition in a different county from that in which

the venue is laid. *Attorney-General v. Parsons*, 165

VERDICT.

See ARBITRATION, 17—Costs, 22—JUDGMENT (ARREST OF), 2.

In trespass, the defendant in his third plea justified under an alleged right of way with horses, carts, and carriages, for the purpose of fetching goods and water from a navigable river. The jury affirmed the right set up so far as it related to the fetching of water, but negatived it as to the rest:—The Court directed the verdict to be entered distributively (for the plaintiff as to the goods, for the defendant as to the water), under the rules of Hilary Term, 4 Will. 4, *Trespass*, V., ss. 4—6. *Knight v. Woore*, 201

VERIFICATION.

See PLEA, 15.

WAIVER.

See ARBITRATOR, 16—BAIL, 9—Costs (BILL OF)—COURT OF REQUESTS, 3—DECLARATION, 5, 6—DISTRINGAS, 2—PLEAD (RULE TO)—SMALL DEBTOR, 7—SUMMONS WRIT OF), 5.

1. The constable of Dover Castle being in contempt for not bringing in the body, the plaintiff attended a justification of bail at chambers under protest of irregularity; the bail justified, and the plaintiff afterwards received the debt and costs from the constable under threat of an attachment:—*Held*, that opposing the bail was no waiver of the contempt; and that the plaintiff was, notwithstanding, in a situation to move for an attachment. *Smith v. Andrews*, 607

2. An undertaking to put in bail waives the objection to a second arrest, for the same cause of action, without a judge's order. *Holliday v. Lawes*, 485

WITNESS.

WARDEN.

See PRISONER, 1—SUPERSEDEAS, 1.

WARRANT.

See DETAINER.

WARRANT (OF ATTORNEY).

See SATISFACTION (ON RECORD)—STAY OF PROCEEDINGS, 3.

1. In applying to sign judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive, to shew that a check of his has been paid, dated thirteen days before the application. *Jacobs v. Griffiths*, 577

2. In applying to sign judgment on a warrant of attorney, it is insufficient for the deponent to swear that he believes the defendant to be alive, from information which he has received, unless he also swears that he believes the information to be true. *Reeder v. Whip*, 576

3. The Court allowed judgment to be entered up on an old warrant of attorney on the 5th November, the defendant not having been seen alive since the 30th of the previous September. *Stocks v. Willes*, 221

4. The Court allowed judgment to be signed on an old warrant of attorney, the application being made on the 5th of November, in Michaelmas Term, although the defendant had not been seen alive since two or three days before the 1st of March previous, and then in New South Wales. *Johnson v. Fry*, 215

WITNESS.

See ATTACHMENT, 10.

1. A witness, who originally signed the deed of the Liverpool Building Society, and obtained a share, by which he has an interest in its funds, is not rendered competent by ex-

WRIT (ABATEMENT OF).

changing his share for a salary from the society, and cancelling it by the authority of the society, or by releasing his claim on it for salary.

Rigby v. Waltham, 527

2. If a witness has received an adequate sum from one party for his expenses on being subpoenaed, and he consents to accept a shilling for his expenses, with his subpoena, when served by the opposite party, he will still be liable to an action by the latter, if he does not attend pursuant to the exigency of the writ. *Bettley v. M'Leod*, 481

3. The plaintiff in the action is not a competent witness to the assignment of a bail-bond. *Wright v. Barrett*, 64

4. Where a witness refreshes his memory, with respect to a particular fact, by a memorandum, it must be produced. *Howard v. Canfield*, 417

WITNESS (EXAMINATION OF, ON INTERROGATORIES).

The Court granted a commission for the examination of a witness in an action for criminal conversation with the plaintiff's wife. *Norton v. Lamb*, 181

WOODS AND FORESTS.

See CROWN LAND.

WRIT.

The record is conclusive evidence of the day on which the writ issued; and if a wrong day has been inserted, the proper course is to apply to the Court to amend the record at the cost of the plaintiff's attorney. *Whipple v. Manley*, 100

WRIT (ABATEMENT OF).

See ABATEMENT (OF WRIT).

WRIT (OF TRIAL). 827

WRIT (AMENDMENT OF).

The Court will not allow a writ to be amended, unless it appears the plaintiff's remedy would otherwise be entirely lost. *Partridge v. Wellbank*, 93

WRITS (FEES AS TO), p. 646.

WRIT (INDORSEMENT ON).

See ATTORNEY, 3—COURT OF REQUESTS, 1—DISTINGAS, 5—SUMMONS, 3.

WRIT (OF RIGHT).

Where an original writ of right had been set aside by a Court of equity, after the issuing of a grand cape—this Court set aside the latter writ *without costs*, the demandant having previously given notice that he abandoned it. *Foot, Dem. Shireff, Ten.*, 53

WRIT (OF TRIAL).

See COSTS, 12—COURT OF REQUESTS, 3.

1. No judgment can be given for either party, where an action for a tort has been tried before the sheriff under the Writ of Trial Act. *Smith v. Brown*, 736

2. On shewing cause against a motion for a new trial in a cause tried before the sheriff, affidavits are admissible stating facts proved at the trial, but which do not appear upon the sheriff's notes. *Lilley v. Johnson*, 606

3. Where, on a trial before the sheriff, a verdict is found for the defendant, and the sum claimed by the plaintiff is less than 5*l.*, the Court will not interfere to disturb it, on the ground of its being against evidence. *Lyddon v. Coombes*, 560

4. Where a cause is directed to be tried before the sheriff, the issue must

be framed according to the form given by R. H. T. 4 Will. 4, No. 4; and if the issue has been made up and delivered before the order for trial, an order should be obtained for its amendment. *Peel v. Ward*, 169

5. The Judge who tries a cause under a writ of trial, has no power to certify to deprive the plaintiff of costs, where the verdict is under 40s. *Jones v. Bond*, 455

6. If there is cause to suppose the action is brought for less than 40s., that should be stated as an objection to the order for the writ of trial. *Ib.*

7. Where the date of the writ of

summons was incorrectly stated in the writ of trial, the Court set aside the verdict. *Wight v. Perrers*, 463

8. Where the issue was not according to the form given by R. H. T. 4 Will. 4, No. 4, the Court gave the plaintiff leave to amend, on payment of costs. *Attmill v. Baker*, 462

9. An affidavit, on which a rule was obtained for setting aside the issue and Judge's order to try before the Secondary, omitted to state that there had been any order; but the rule was drawn up on reading the order:—*Held* sufficient.

END OF THE FIFTH VOLUME.

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